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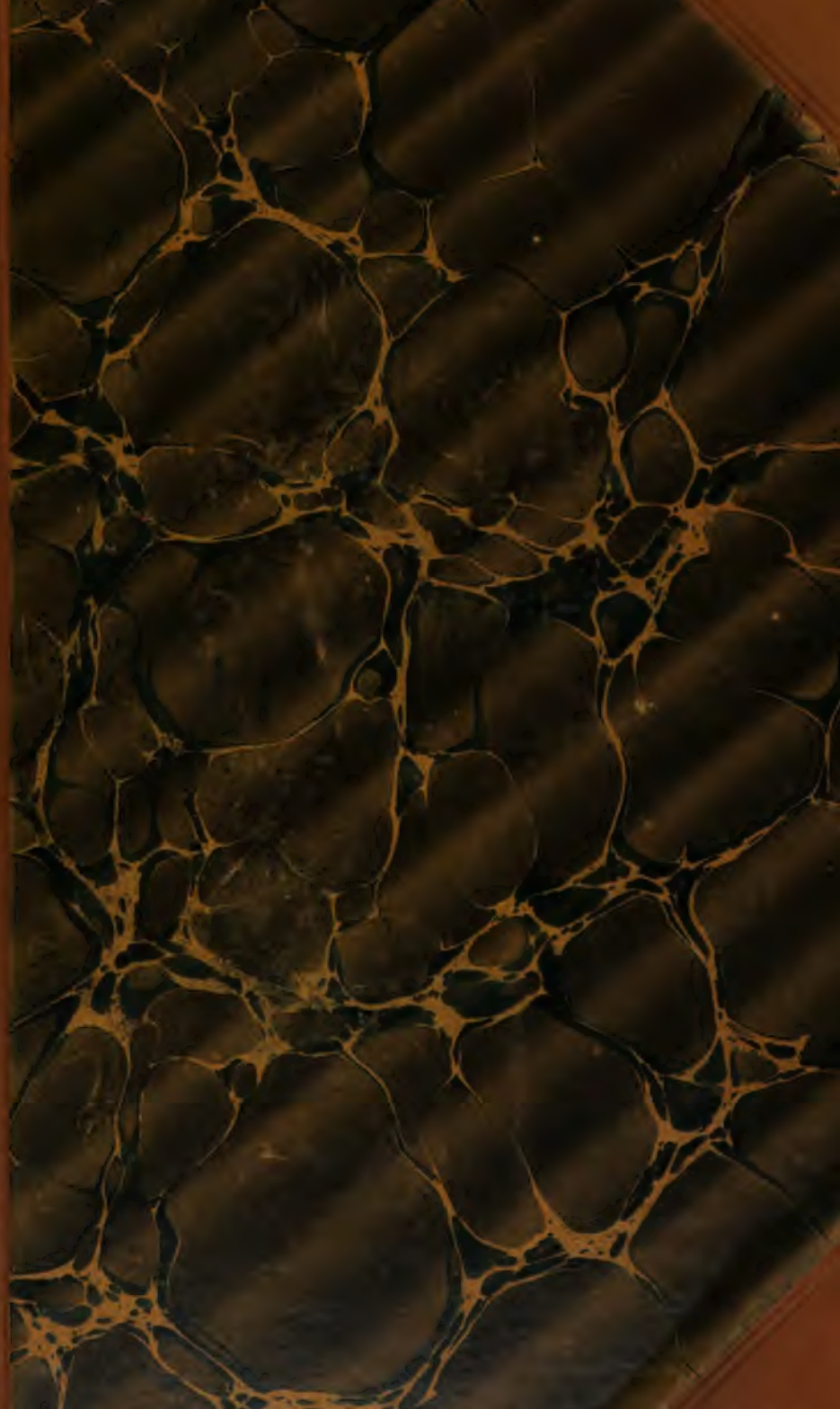
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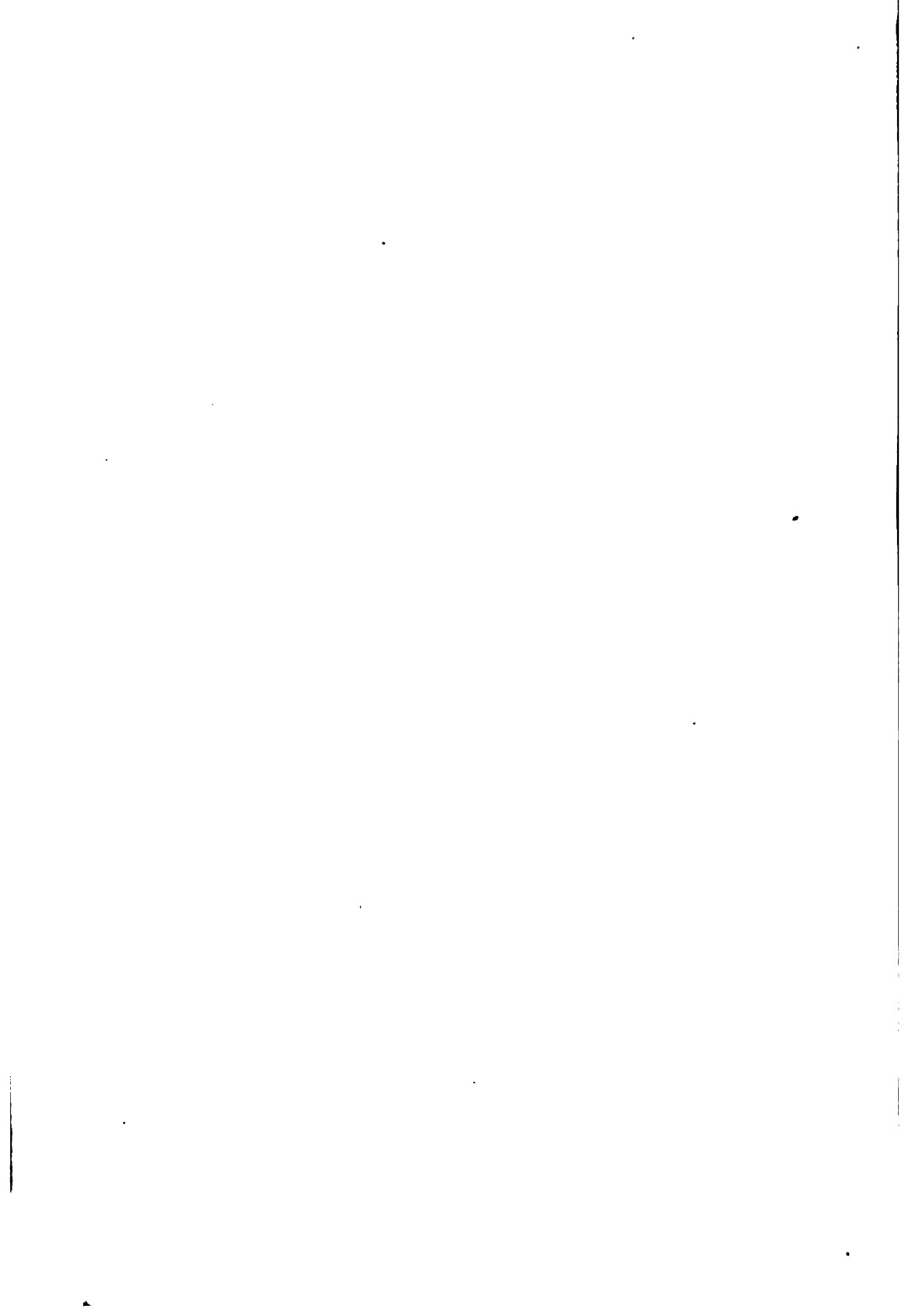
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# REPORTS

OF THE

DECISIONS OF THE REFEREES APPOINTED FOR THE  
PURPOSE OF THE DRAINAGE LAWS

AND OF THE

## COURT OF APPEAL FOR ONTARIO

IN CASES WHERE THE REFEREES' DECISIONS  
HAVE BEEN APPEALED FROM, AS WELL  
AS OF SOME OTHER IMPORTANT  
DECISIONS OF THE COURTS  
RELATIVE TO THE  
DRAINAGE LAWS

INCLUDING A COLLECTION OF DECISIONS UPON QUESTIONS ARISING UNDER "THE DITCHES  
AND WATERCOURSES ACT," "THE MUNICIPAL DRAINAGE ACT" (R. S. O. 1897,  
CHAPTER 226), WITH AMENDMENTS, AND "THE DITCHES AND WATER-  
COURSES ACT" (R. S. O. 1897, CHAPTER 285), WITH AMEND-  
MENTS, ANNOTATED, WITH THE NAMES OF THE CASES  
BEARING UPON THEM, REPORTED IN  
THIS VOLUME.

ALSO THE GENERAL RULES RELATING TO THE PRACTICE AND PROCEDURE UNDER "THE  
MUNICIPAL DRAINAGE ACT," WITH A TABLE OF THE NAMES OF THE CASES RE-  
PORTED, A TABLE OF THE NAMES OF THE CASES CITED AND A  
DIGEST OF THE PRINCIPAL MATTERS.

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### VOLUME II.

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By ALFRED HENRY CLARKE, K.C.

AND

EDMUND I. SCULLY,

STENOGRAPHER FOR TRIALS BEFORE THE REFEREE

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TORONTO:  
THE CARSWELL COMPANY, LIMITED,  
1903.



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THE  
LITERATURE OF THE  
UNITED STATES  
DEPARTMENT,

To the  
**Honourable G. M. Ross**  
Premier of Ontario  
this work is  
**Respectfully Dedicated**

1. The first part of the document is a letter from the President of the United States to the President of the Senate, dated January 1, 1877. The letter is signed by Rutherford B. Hayes and is addressed to Charles Schreyer. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States.

# REFEREES

**Appointed for the purpose of the Drainage Laws.**

---

BYRON MOFFATT BRITTON, Q.C., of the city of Kingston;  
appointed June 1st, 1891; resigned 19th September,  
1896.

THOMAS HODGINS, Q.C., of the city of Toronto; appointed  
October 1st, 1896; retired May 12th, 1900.

JOHN BROWN RANKIN, K.C., of the city of Chatham;  
appointed May 12th, 1900.



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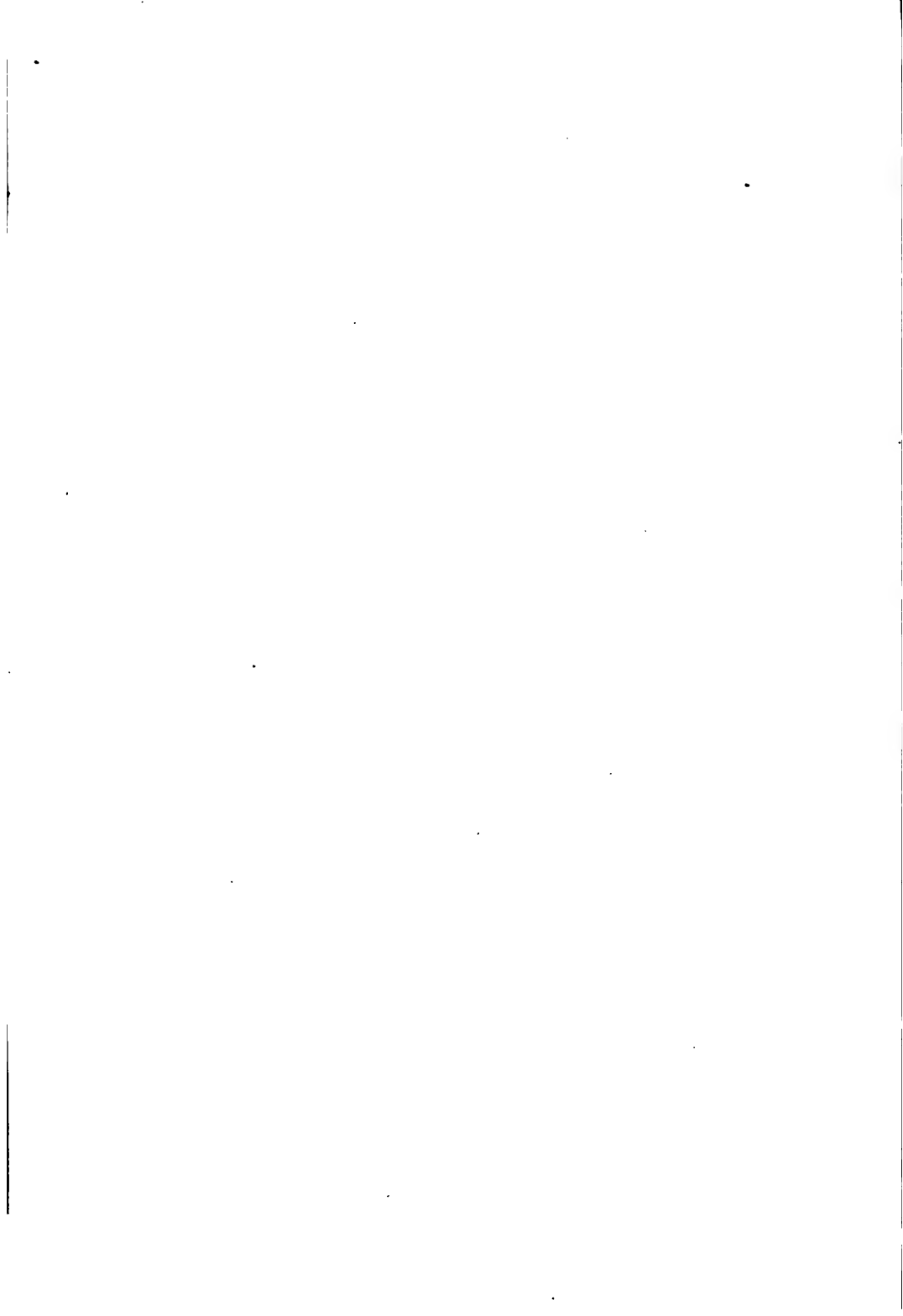
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## COURT OF APPEAL, ONTARIO.

McCULLOCH vs. TOWNSHIP OF CALEDONIA.

(Reported 25 O. A. R. 417.)

### *Invalid By-law—Damages—Charging Assessed Area.*

The municipal council of a township passed a provisional by-law for the construction of drainage works affecting land in three townships, in accordance with the assessment, specifications and estimates contained in the report, upon petition, theretofore made by their engineer. On the matter coming up before the Court of Revision it was found that the petition had not been signed by the necessary number of owners. The council then, without any new petition or engineer's report, altered the report already made, reducing the size and cost of the work, changing the specifications, estimates and assessments accordingly, and passed a by-law for the construction of the works, as in the altered report, in the three townships:—

Held, that this by-law was void.

Raleigh vs. Williams (1) applied.

Where a by-law for the construction of drainage works is void, damages awarded to a landowner on account of injury to his crops caused by the negligent construction of the work are not to be charged against the drainage area assessed for the work, but are chargeable against the initiating municipality.

Judgment of the Drainage Referee reversed in part.

This was an appeal by the plaintiff from the judgment of the Drainage Referee, reported at p. 340, Clarke and Scully's Drainage Cases, vol. 1.

The following statement of the facts is taken from the judgment of Osler, J.A.

This action is brought by the plaintiff as the owner in fee of certain land in the township of Alfred, to recover damages for injuries sustained by reason of water brought down upon the land by the negligence of the defendants.

The statement of claim alleges that a natural water-course, known as the Caledonia Creek, flows through the land, to the use of which in its natural condition the plaintiff is entitled, and that her land and other lands are drained

(1) [1893] A. C. 540, at p. 550.



thereby; that in October, 1891, the defendants began to deepen, clean and widen the stream, and that owing to the negligent manner in which they did so, much larger quantities of water came into the creek and flowed down it with greater velocity than had formerly been the case; and the defendants having provided no sufficient outlet therefor, the water flowed over the plaintiff's lands in the years 1892, 1893, 1894, 1895 and 1896, doing great damage to her crops and otherwise.

The defendants plead that in 1891, acting upon the petition of the owners of lands drained or partially drained by this creek, and pursuant to the powers and authority conferred upon them by the Municipal Act then in force, they procured plans and estimates of the cost of certain proposed improvements in the creek and an assessment of the cost upon the lands proposed to be benefited, and that on the 12th of September, 1891, the report of the engineer employed by them for that purpose, as amended by the Court of Revision for the trial of complaints against the assessment, was adopted by a by-law No. 255 of the defendants, and that any alteration made or work performed in the said creek was done and performed in the lawful execution of the improvements mentioned and referred to in the by-law; that the petition referred to was signed by John McCulloch, the plaintiff's husband, as a party interested in the proposed work in respect of the land; that he was the manager of the plaintiff's business generally and in particular with respect to all matters relating to the said land, and was her duly authorized agent in signing the petition and presenting it to the council, and she afterwards ratified and confirmed his action in that respect. That if the plaintiff has sustained any damage in consequence of the work, a great part of the work which is now said to have been negligently executed was done by the plaintiff's husband with her workmen and with her horses, implements, etc., and the proceeds of the work were largely used and applied for the common benefit of the plaintiff and her husband, and the latter acted throughout with her full knowledge, privity and consent, *per quod* the plaintiff is estopped,

etc. That before the commencement of the work the Caledonia Creek did not effectually drain the said land as alleged, but on the contrary a large part thereof was annually overflowed and rendered unfit for cultivation, and the plaintiff has not only not been damaged as alleged in the claim, but the lands have been greatly improved and benefited by the improvements. The defendants also say that prior to the action the plaintiff never made any complaint to them of the nuisance alleged, or notified them that her lands, etc., were suffering damage; that the defendants acted in all things in the lawful exercise of the statutory powers vested in them by the Municipal Act, and if the plaintiff has sustained damage for which the defendants are responsible, she cannot recover it in an action, but should have referred the same to arbitration pursuant to the Drainage Act of 1894, 57 Vict. ch. 56, sec. 93 (O.).

Lastly, the defendants allege that the plaintiff did not serve on the defendants any notice of her claim for damages, nor did she file any such notice in the office of the Clerk of the County Court of the county in which the land is situate, and in other respects failed to comply with the provisions of the said section 93, and the defendants submit that she cannot maintain the action, or recover damages from the defendants in respect of the matters aforesaid.

On this the plaintiff joined issue.

The action was entered for trial at the sittings of the High Court held at L'Orignal on the 26th of May, 1897, before Meredith, J., who made an order referring it to the Drainage Referee under the Drainage Act, before whom it came on to be tried on the 23rd of June, 1897, and following days.

The Referee held as to the claim for damages for the year 1892, that it was a claim for damages done to property during the construction of drainage works or consequent thereon, and that in the absence of proof of service and filing of the notice of claim, as required by section 93 (2) of the Drainage Act, it was not recoverable in this action.

The damage sustained in 1893 was found to have been caused by the flooding caused by the backing up of the Nation River and not by the defendants' negligence.

They were found liable for the damage caused in 1894 and 1895, because the drainage work was insufficient for the purpose for which it had been constructed. For the same reason they were held liable for the damage of 1896. Damages were assessed in all at \$189, viz., for 1894 \$91.25, for 1895 \$37, and for 1896 \$60.75; and such damages were directed to be borne as required by section 97 (1) of the Drainage Act, *i.e.* by the lands in the area assessed for the drainage work by the by-law under which it purported to have been done.

The plaintiff appealed and the appeal was argued before Burton, C.J.O. Osler, MacLennan, and Moss, J.J.A., on the 26th, 27th and 30th May, 1898.

J. M. McEvoy, and A. McCrimmon, for the appellant.

Robinson, Q.C., and W. S. Hall, for the respondents.

November 15th, 1898. Burton, C.J.O.:—

I agree in thinking the by-law under which the defendants attempt to justify absolutely null and void for numerous reasons, but it is sufficient to say that it is not founded upon a report, plans, estimates or specifications of an engineer appointed by the council to deal with the works petitioned for, but provides for a drainage work initiated by the council itself under specifications prepared by itself, and upon property selected by itself instead of by the engineer.

The work, therefore, was done without legal authority and the plaintiff is entitled to maintain an action as if no such by-law had been ever passed, but looking at the manner in which with her concurrence her husband took a contract to do the cutting, she was I think well advised in bringing the action for negligence instead of treating the defendants as trespassers.

I think that if the learned Referee's judgment was varied in the two respects suggested by my brother Osler, substantial

justice will be done and the defendants should pay the costs of the appeal.

Osler, J.A.:—

The plaintiff appeals (1) on the ground that the damages having been caused by the negligence of the defendants, the initiating township, no part thereof ought to have been cast upon the other two townships, as the effect of this would be to make the plaintiff, whose lands lay in Alfred, contribute to a large share of her own loss; and (2) against the refusal to award anything in respect of the damages suffered by the plaintiff in 1892, which were owing, as much as those of other years, to the defendants' negligence, and were the subject of an action strictly and not of proceedings for compensation by way of arbitration; and (3) as to the damages for 1896, that no reduction should have been made therein on the ground of the plaintiff herself having contributed to them by using her land with the knowledge that it was likely to be flooded; and (4) it was further contended that the by-law, under the authority of which the defendants justified their operations, was wholly void and invalid, and, therefore, that the plaintiff's remedy against them was not subject to any of the restrictions imposed by the Drainage Act as to notice or proceeding by way of arbitration, etc.

The defendants supported their by-law, and the judgment of the Referee in so far as related to the damages claimed for 1892 and 1893, the reduced amount for 1896, and the charge of the whole amount awarded upon the area assessed under the by-law. They contended that the damage awarded was not caused by their negligence, and that if the plaintiff was entitled to recover anything at all she should have proceeded by arbitration and not by action, and they cross-appealed on this ground.

The defendants also contended that the plaintiff was identified in interest with her husband, and that by reason of his acts as her agent or manager of her farm she was estopped from objecting to the by-law and from objecting that her loss was caused by the action of the defendants.

In the present state of the statute law it appears to be a matter of little moment whether a party commences his proceeding for statutory compensation by arbitration or by action. If he has adopted the latter course when he should have taken the former, the reference of the action to the Drainage Referee remits his demand to the proper jurisdiction: *Township of Ellice vs. Hiles*(2), *Thackery vs. Township of Raleigh*(3). The preliminary notice required by section 93, sub-section (2), in cases where arbitration is the appropriate remedy, may perhaps be necessary, though as to this I express no opinion, but in other respects the plaintiff cannot be turned round merely because he has issued a writ instead of proceeding by arbitration.

It will simplify the consideration of the case to inquire in the first place whether the by-law under which the defendants justify their proceedings is, or is not, a valid by-law, a question to which the Referee's attention cannot have been directed. If it is not, questions as to what part of the plaintiff's claim is arbitrable, and as to notice of the claim having been filed and served within a year from the time it arose, and perhaps others also, will be eliminated.

The by-law was for the deepening, widening and cleaning parts of a watercourse called the Caledonia Creek, a stream of considerable size flowing through the townships of Caledonia, Alfred and Plantagenet, and discharging into the Nation River in the latter township.

Proceedings were commenced by a petition to the township council of Caledonia signed by twelve ratepayers of Caledonia and four of Alfred, dated the 25th of May, 1891, setting forth that it was expedient to deepen and widen Caledonia Creek from lot 18 in the 5th concession of Caledonia to the Alfred boundary, and thence through the township of Alfred to a point intersected by a channel into which the watercourse at present flows, and thence to the outlet of the channel known as the Franklin Creek. This petition was signed by twelve property owners on nine lots in Caledonia, four in Alfred, and by none in Plantagenet.

(2) (1894) 23 S. C. R. 429.

(3) (1898) 25 A. R. 226, 231.

The council referred it to their engineer with the usual instructions under section 569 of the then Municipal Act. He made a report bearing date the 13th of July, 1891, in which he stated that he had examined the creek from the Nation River up to lot 18 in the 5th concession of Caledonia, and recommended a scheme by which the creek was to be cleaned, deepened, widened and improved, at a cost of \$1,959. The scheme involved the making of a new outlet from a certain point on the creek in the township of Plantagenet, through that township to the Nation River, and shortening its course by making cuts through farm lots at various places, notably one through the plaintiff's farm in the township of Alfred. The specifications set forth the depth and top and bottom width of the drain and the work to be done therein. The cost of construction and improvement was estimated at \$1,959, including clerk's and engineer's fees, and was assessed against lands and roads improved in Caledonia as set forth in the schedule to the report \$1,241, the same in Plantagenet \$76, and in Alfred \$642.

On the same day, 13th of July, 1891, a provisional by-law was passed for the adoption of the engineer's scheme as reported, the report being set out in full. The by-law purports to impose an assessment, and to fix the rate to be levied upon the lands benefited in each township, and notice is given thereby that a Court of Revision will be held at the town hall in Fenaghvale in the township of Caledonia to hear appeals against the "above and foregoing" assessments, that is to say, the assessments in all three townships, on Friday, the 30th of August, 1891. Notice of appeal was required to be served on the clerk of Caledonia eight days before the session of the Court, and parties intending to move to have the by-law quashed were required to serve notice in writing as required by the statute, etc.

The by-law was duly published on the 5th, 12th, 19th, and 26th of August. When the Court of Revision met, it was observed that the petition of the property owners was not sufficiently signed to justify a scheme of the proportions and cost recommended by the engineer, and the Court was

adjourned until the 12th of September, the council having determined to pass a by-law to carry out a very different scheme, the cost of which was to be \$1,411 only, assessed against lands and roads in Caledonia, \$755, 19 lots in two concessions instead of 138 lots in four concessions as in the engineer's report; in Plantagenet, the same as in the report, \$76; and in Alfred, \$580, omitting the lots in one concession. This by-law was passed at the adjourned meeting of the Court of Revision, notice of which had been given to the property holders affected. It was, of course, an entirely different by-law from that which had been previously published. It was published once in a newspaper after it was passed, on the 30th of September, 1891. It does not appear to have been registered. It purports to assess the lots mentioned therein in the three townships affected, and to provide for the levying and recovery of the assessment by the corporation of the initiating township. It recites an alleged report of the engineer dated the 28th of August, the frame and language of which are the same as those of the former report, but limits the assessments to the lesser number of lots, and reduces the cost of the work, and the size of the improvements in the way of cutting the outlet and cross-cuts which had been recommended in the report of the 13th of July. It is the fact that no new report was made by the engineer, and that the report, as set forth in the by-law, was never in existence, and represents merely changes made by the council itself in the report of the 13th of July. It appeared that the engineer was present when the council determined to adopt the substituted scheme, and although it is said that he made no opposition, his position, as stated in the reeve's evidence, was practically this, "that if the council wanted to change his report they could, but that it would not be his report." Elsewhere in the evidence it is stated that he thought the lessening of the width of the creek was not right, that the council asked him to change it and that he refused to do so.

A by-law thus passed is not such a by-law as is authorized by the Municipal Act, R. S. O. 1887, ch. 184, or the sub-

sequent Acts in which the drainage clauses of that Act are found. It is a by-law which affected three townships and was passed by one of them without complying with the conditions on which the jurisdiction to do so depended. Had its operation been confined to the township of Caledonia alone it could not have been upheld as a by-law under section 569. As it is, its two obvious defects are: first, that it is not founded upon any by-law provisionally passed as by law required, for it provides for an entirely different scheme from that of the provisional by-law of the 13th of July, 1891 : *Corporation of Raleigh vs. Williams* (4), and secondly, that it is not based upon any report, plans, estimates or specifications of an engineer appointed by the council to deal with the drainage work petitioned for, but provides for a drainage work devised by the council itself to be carried out in accordance with their own specifications and directions, and the cost of which is assessed upon property selected by themselves in their own and in two other townships.

The by-law is open to other objections, one of which is that the council omitted to comply with the requirements of section 579 as to the other townships affected, and profess to work out the whole scheme of assessment, revision of assessment, and collection of rates, through their own municipal machinery. It is unnecessary, however, to consider these objections at length. It is enough to say that the effect of those which I have already dealt with is that the by-law is a void by-law and that the work done thereunder was done without legal authority.

From this it seems to follow: 1st, that the plaintiff has the right to enforce, in the ordinary way, her claim for the damage sustained by her by any action which she could maintain without having first set aside the by-law and without being subject to any of the restrictions imposed by the 93rd section of the Drainage Act; and 2nd, that the Referee had no power to restrict the damages awarded to be recovered by assessment upon the drainage area originally assessed.

(4) [1893] A. C. at p. 550.



This opens the question of the plaintiff's claim for damages in 1892, which the Referee disallowed on the ground that, being the subject of arbitration alone, it could not be recovered because no notice of the claim had been given as required by the 93rd section.

The cross-appeal, which strikes at the plaintiff's right to recover anything at all, may conveniently first be considered so far as it has not been already disposed of by what I have said as to the invalidity of the by-law. Substantially the defence on this ground is reduced to the two objections, (1) that the plaintiff is not really the owner of the farm alleged to have been damaged, but that it belongs to her husband, to whose improper and negligent conduct in digging the drain through the farm under his contract with the defendants the damage is alone attributable; and (2) that even if the plaintiff is to be regarded as the owner, she is identified with her husband, who was her manager and agent in all that was done.

It appears that the husband conveyed the land in question to the plaintiff in September, 1890, the expressed consideration being natural love and affection, the sum of \$100, and a covenant on the wife's part to indemnify him against certain incumbrances on the land. The husband and wife continued to live together on the farm, and the former continued to manage it very much as he had formerly done. He also signed the petition of the 25th of May, on which the engineer's report of the 13th of July, 1891, was founded, and he took the contract for digging the cut through the farm provided for by the by-law No. 255, and the cutting was excavated and made by him under that contract so far as it was done.

All this may well be inferred from the evidence to have been done with the knowledge and without the disapproval of the plaintiff, although as regards the cutting through the farm the husband was not her agent, but the contractor with and the agent of the municipality. I think the evidence could not warrant us in holding that the deed to the wife was not a real transaction, and that she is not the owner of the

land. I think she is, and we have nothing to do with any possible rights of the husband's creditors, if he had any, to impeach it.

The most we can say is that the plaintiff could not maintain, and indeed she does not seek to maintain, an action of trespass against the defendants for what was done, particularly as the by-law has never been set aside: *Hill vs. Mid-dagh* (5).

The action is grounded on the negligence of the defendants in not making the drain through the plaintiff's farm of sufficient capacity to carry away the water which by their work on the creek above the farm they brought down upon it, and which thus overflowed the land and caused the damage complained of.

There is ample evidence to show that this was the case and that the damage would not have happened had the cutting been made of the size recommended by the engineer in the only report he made to the council.

There is, in my opinion, sufficient evidence of negligence in this respect to maintain the action. It may be that the damage was to some extent attributable to the failure of the plaintiff's husband to make the excavation to the full extent he contracted to make it, but even had he complied literally with the terms of his contract, it is evident that the cutting would not have been sufficient to carry away the water brought down by reason of the other work on the creek. The Referee has made some allowance in this respect, and considering the difficulty there is in arriving on the evidence at any exact estimate of the plaintiff's loss, I do not quarrel with the way in which he has disposed of the case in regard to the years 1894, 1895 and 1896. There is evidence also to support his finding that the damage of 1893 was directly owing to the waters of the Nation River having backed up and flooded the farm, rather than to overflow from the waters above it. There is nothing, in the way in which I view the case, to prevent the plaintiff from recovering for the damage of 1892, a fair

estimate for which, I think, would be something under \$100. Probably \$80 would be a reasonable sum to allow.

The report of the Referee should be varied in the two particulars I have indicated, viz., by increasing the damages by \$80 and by striking out that part of it which directs them to be levied upon the area assessed. The defendants must pay the costs of the appeal.

MacLennan, and Moss, JJ.A., concurred.

*Appeal allowed.*

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COURT OF APPEAL, ONTARIO.

IN RE TOWNSHIP OF RALEIGH AND TOWNSHIP OF HARWICH.

(Reported 26 O. A. R. 313.)

*Outlet—Drainage Act, 1894, sec. 75.*

A drainage scheme under section 75 of the Drainage Act, 1894, cannot be upheld if the engineer does not make provision for a sufficient outlet for the water dealt with.  
Judgment of the Drainage Referee reversed.

Appeal by the township of Raleigh from the judgment of the Drainage Referee, reported at page 348, Clarke and Scully's Drainage Cases, Vol. 1.

The question involved was the validity of a scheme, initiated by the township of Harwich, for the repair and improvement of the Lock drain in the township of Harwich and the Gregory drain in the township of Raleigh, and the Drainage Referee upheld the engineer's report.

The appeal was argued before Burton, C.J.O., Osler, MacLennan, Moss, and Lister, JJ.A., on the 17th and 18th of January, 1899.

Aylesworth, Q.C., and J. B. Rankin, for the appellants.

Matthew Wilson, Q.C., for the respondents.

May 9th, 1899. Burton, C.J.O.:—

On the application to the council of the township of Harwich on the part of two ratepayers, whose lands were damaged by reason of the Lock and Gregory drains being out of repair, a resolution was passed ordering them to be put in repair with sufficient outlet, and that the engineer be appointed and instructed to make the necessary examination, prepare plans, specifications and estimates, and report at the next meeting.

That instruction, however, the engineer refused to follow, because he felt that the water could not be carried to a sufficient outlet, and at the next meeting of council those words were struck out, and the engineer was instructed merely to repair the drains in question and to make the necessary survey and to prepare plans, specifications and report.

If those instructions had been adhered to, we should probably never have heard of this difficulty, but the scheme proposed contemplated not merely repairs, but a considerable enlargement of the works, whereby a much larger body of water would necessarily be carried down and *ex concessis* would not find a sufficient outlet, but would be admittedly insufficient as long as the culvert at the railway remained at its present width.

The engineer admitted that the enlargement of that culvert formed part of his scheme, although he admits that that could only be secured by agreement with the railway, of which he saw no immediate prospect; but, as I understand his evidence, he went far beyond that. He, in answer to a question whether, under his scheme now in question, the Gregory drain could ever have a sufficient outlet as long as the culvert was there, replied "Or any other scheme."

The learned Referee, from whose decision this is an appeal, delivered no formal judgment, but placed his decision mainly on the ground that the appellants were estopped from impeaching this scheme. I am unable to take that view, but one of the grounds for allowing an appeal from the engineer's report under section 63, is that the scheme does not provide for a sufficient outlet, and upon that short ground I think the appeal should be allowed.

Osler, J.A.:—

The point on which, in my opinion, this appeal turns is a simple one, namely, whether the engineer was bound to provide a sufficient outlet for the waters, which, by means of the works he recommended upon the drains in question, would be brought down and discharged in the township of Raleigh into the Indian Creek drain. Many other questions were raised and argued, which may be passed over as having no bearing upon the real point in controversy.

The drainage system of the area may be briefly described:

Harwich is the upper and Raleigh the lower township. The course of the Lock drain is in a north-westerly direction from a point between lots 22 and 23 in the 2nd concession, W. C. R., of the township of Harwich, to the north-west corner of lot 27 in the third concession, W. C. R., of that township, where it discharges after crossing the town-line between Harwich and Raleigh, into the Gregory drain in the latter township. It receives at its upper or southern end the waters of the Cameron and Walker drains. The Gregory drain commences at the lower end of the Lock drain, runs in a northerly direction through Raleigh, receiving in its course the waters of other Harwich drains, and discharges into Indian Creek drain at the junction of the latter with the Mud Creek drain on the north side of the concession road between the 3rd and 2nd concessions of Raleigh at lot 24 in the 2nd concession. Mud Creek drain runs in a southerly and then easterly direction through lots 22 and 23 in the 2nd concession of Raleigh, and along the north side of the concession road to the Indian Creek drain. The latter passes easterly through lot 24, concession 2, Raleigh, and lots 1, 2 and 3 in the 2nd concession of Harwich (now within the city of Chatham), and after crossing the concession road between the 2nd and 3rd concessions of Harwich (a continuation of the concession road already mentioned between the corresponding concessions of Raleigh), at lot 3, and passing through a culvert under the Erie and Huron Railway, discharges into McGregor Creek at a point in lot 3 in the 3rd concession of Harwich just mentioned.

The Walker, Lock and Gregory drains, though constructed under different by-laws and at different times, thus form in fact one continuous drain running in a northerly direction. Mud Creek drain and Indian Creek drain in a similar way form a continuous drain, receiving at one point in its course the waters of the former, and McGregor Creek is, therefore, the only outlet for them all.

On the application of two ratepayers of Harwich the council of that township, on the 9th of March, 1897, passed a resolution appointing an engineer to make the necessary examination and report for the purpose of having the Lock and Gregory drains repaired "with sufficient outlet." This resolution was rescinded on the 12th of April, and another was passed by which the engineer's instructions were limited to making a report upon "repair" of the drains only.

On the 13th of July, 1897, the engineer reported that he had made an examination and survey, and prepared plans and specifications with estimates of cost, with a view to the repairs and improvements of the drains, in this latter respect going beyond the resolution of the council; that he found them out of repair and needing improvement to relieve lands from overflow along their course, and he recommended that they be made to conform to the data furnished on the profile accompanying the report, the drains to be in the course of the old drains, excepting that angles and projections should be dressed off to straighten the drains with easier curves, etc. "The work is continued in the natural flow of the water to the head of Indian Creek drain, now undergoing improvement, which is designed as a sufficient outlet save for the back flow from the river (Thames), which cannot be remedied."

The proceedings were taken, as it was admitted on the argument, under section 75 of the Drainage Act of 1894, which provides for "repairing upon report" without petition. We have held that one township has jurisdiction under this section to undertake such a work as this, dealing with connected drains in its own and an adjoining township: *In re Stonehouse and Plympton* (1897) (1).

The appeal to the Referee was brought on the 15th of September, 1897, under section 63 of the Drainage Act of 1894, substantially on the ground that the engineer's scheme did not provide for a sufficient outlet. In November, 1897, the appeal was dismissed.

The object of the present proceeding is to restrain the council of Harwich from adopting the engineer's report. We are not dealing with a scheme which has been adopted by the council, and which they have passed a by-law to carry out. I do not think it appears that they have even as yet passed the provisional by-law. The question is raised, at the proper time for doing so, of the justice and propriety of the proposed scheme. With questions of compensation and damage, as they have not yet arisen, we have nothing to do, further than this that we see that the engineer has made no provision for matters of that kind in his report, and that if the proposed scheme is one, the carrying out of which seems likely to do considerable injury to landowners, who, according to the contention of some, may thus be driven to the Court of Revision to put their claims forward there to the extent at least of their assessment, that may form a reason against its adoption.

When an extensive scheme is proposed to be undertaken by one township, involving work, not merely of repair but repair and improvement, to be done by them in an adjoining township, the onus of supporting the scheme is cast largely upon the township which propounds it. It is bound to make out that it is reasonably necessary, and that it is, so far as it can be made so, complete in itself, and one which is not likely to involve the initiation of a new work by the latter township in order to relieve itself from the waters which the other will bring down upon it.

The 75th section confers ample power upon the engineer to deal with the subject of outlet. He may provide for a new outlet or otherwise improve, extend, or alter the existing work, including, of course, the improvement of an existing outlet.

It was urged by Mr. Wilson that the engineer was not bound to provide a sufficient outlet, that the language of section 59 and other relative sections was facultative or permissive merely, and that any injury done to lands on which water might be discharged was matter for compensation.

It is not necessary to decide this point. My present impression is against it. Even where a sufficient outlet is provided claims for compensation will arise, and it seems unreasonable for the initiating municipality to provide a scheme which will result in discharging the water upon its neighbours, leaving them to get rid of it as best they can. At the present stage of the proceedings the objection to a drainage scheme on the ground that it provides no proper or sufficient outlet appears to me to be a good objection, and I think the effect of section 63, sub-section 2 (a) (2), is to make it a statutory one.

I have attentively perused the evidence taken before the learned Referee. I think it shows that the contemplated repairs and improvements will effect a considerable change in the original carrying capacity of the Lock and Gregory drains as regard both the quantity of water brought down to the point of discharge into the Indian Creek drain and the velocity of the discharge. Whatever may be said as to that drain being a continuation of the former two, it appears erroneous so to describe the Mud Creek drain which enters the Indian Creek drain at its upper end, and receives, or should receive, none of their waters, which should pass away with the waters coming from the Mud Creek drain down the Indian Creek drain, and unless the latter is sufficient to take these waters to McGregor Creek, it seems inevitable that they must overflow at the junction with Indian Creek drain or diminish the capacity of the Mud Creek drain by backing up the waters which ought otherwise to pass away through it, and thus cause them to overflow the flats between the Thames and the head of the last mentioned drain. A considerably larger body of water would thus be discharged over that area than it would otherwise be subject to, the latter being what the engi-



neer in his report speaks of as "the back flow from the river which cannot be remedied." If it cannot be remedied it at least ought not to be made worse. Is it, then, clear that the Indian Creek drain is a sufficient outlet? The engineer's report does not so declare it. He says it is "designed as a sufficient outlet," and when his evidence is read it is easy to understand why he has expressed himself so carefully. He refused to act upon the first resolution of the council by which he was instructed to repair "with sufficient outlet" because of the difficulty of doing so, or because it would have involved a larger or more expensive scheme than the council would willingly undertake, and then the second resolution was passed instructing him simply to report as to a scheme for "repair" and leaving the outlet to take care of itself, or assuming that the repairs which were then in course of construction on Mud Creek and Indian Creek drains, under the Raleigh by-law of 1895-6, to be presently mentioned, would make the latter a sufficient outlet. This change in the engineer's instructions is, to my mind, very significant, as showing that no effective outlet was intended to be provided by the present scheme, if the works on the Mud and Indian Creek drains were not sufficient for the purpose. Then, were they so? They were being made under a by-law of the appellant township passed in 1895 "to enlarge and improve Indian Creek drain as an outlet drain," adopting a report of the same engineer whose report is now in question. He says: "It was for Mud Creek that I did all my work in Indian Creek. I had no instructions to make one solitary inch of capacity for the Gregory Creek or any other creek or drain." It is far from being proved that any such scheme as the present was contemplated when that by-law was passed by Raleigh, or that the work authorized thereby was intended as an outlet for waters which might be brought down by the drains, as Harwich now proposes to repair and improve them, viz., by widening and deepening them in some parts of their course. That it would to some extent afford an improved outlet was probable, but that cannot justify a scheme which

(as is also at least probable) will bring down waters which will exceed the capacity of such improved outlet to discharge.

There is also the difficulty which has arisen in the execution of the works under the Raleigh by-law in consequence of the culvert under the Huron and Erie Railway being of smaller capacity than was contemplated by the report of the engineer, although even if an agreement could have been made with the railway company, pursuant to section 85, for its being constructed of the full dimensions which were originally intended, the objection to the present scheme would still have existed. I am unable to agree with the learned Referee that Raleigh is estopped by reason of the by-law of 1895 from objecting to the scheme now proposed by Harwich, and, therefore, am of opinion that the appeal should be allowed. This may result in the parties being obliged to adopt a thorough and more costly scheme—coming to an agreement with the railway and improving the outlet into McGregor Creek, or accepting the compromise upon the lines suggested by the appellants, which, it is said, appear in another report of the engineer.

But, however this may be, I think that the objection of the township of Raleigh to the present scheme should be entertained and their appeal allowed. There is nothing to prevent each township from repairing its own drain to its original capacity or to prevent one from repairing both, if either refuses to attend to its own. But the scheme with which we are now concerned is very different from that.

MacLennan, Moss, and Lister, JJ.A., concurred.

*Appeal allowed.*

## COURT OF APPEAL, ONTARIO.

## MURPHY vs. TOWNSHIP OF OXFORD.

*Engineer's Report—Adoption of Inefficient Plan of Drainage.*

A township is not liable where the council acting in good faith adopts and carries out the plan of an engineer, although the plan may be defective and inefficient, in this, that a more direct, less expensive and better course which would cause no damage could have been obtained by following the natural course of the water. Judgment of the Drainage Referee affirmed.

Appeal by the plaintiff from the judgment of the Drainage Referee, reported at page 350, Clarke and Scully's Drainage Cases, Vol. I.

The appeal was argued before Burton, C.J.O., MacLennan, Moss, and Lister, J.J.A., on the 20th and 21st of September, 1899.

B. M. Britton, Q.C., for appellant.

J. B. Huthcheson, for respondents.

The judgment of the Court was delivered on the 14th of November, 1899, by

Lister, J.A.:—

The action was begun by writ issued on the 13th day of August, 1896.

The plaintiff by his statement of claim alleges *inter alia* that he was the owner of the west half of the south-east quarter of lot number 8 in the 4th concession of the township of Oxford; that the defendants during the years 1882, 1886, and 1892, and at other times subsequent thereto, constructed five culverts or drains upon the road allowance between the fourth and fifth concessions in said township, and opposite the lands of the plaintiff, by reason of which said defendants wrongfully diverted to and brought on to the plaintiff's land large quantities of water which otherwise would not have been brought there; that the defendants were guilty of negligence in the construction of the said culverts or drains, in

not providing a proper outlet for the water, and it accumulated upon the plaintiff's land and rendered same unfit for cultivation, and of no value to the plaintiff; that the defendants passed a certain by-law (known as the Upper Morrison's Creek Drainage Improvement By-law), which purported to be a by-law to provide for draining parts of the township of Oxford lying in the 5th, 4th, and 3rd concessions thereof, and for borrowing on the credit of the said municipality of the said township of Oxford the sum of \$1,831.63 for the purpose of constructing same, under which, and the schedules thereto attached, they assumed to tax several pieces or parcels of land in said concession; that for the purpose of raising the said sum of money the defendants alleged that the lands assessed, including the lands of the plaintiff, would be benefited by the construction of the said drain; that acting under the said pretended by-law the defendants entered upon the work contemplated thereunder, and constructed a ditch or drain, commencing at a point at or near lot number 2, in the 5th concession of the said township of Oxford, and continued same in a north-easterly direction through the 5th, 4th and 3rd concessions of the said township; that the defendants were pretending to construct said ditch or drain under the Drainage Act of 1894, and amendments thereto; but the plaintiff alleges that they did not observe the proper requirements under the provisions of the said Act relating to drainage, in order to give them jurisdiction or rights upon the premises, inasmuch as they did not first require the presentation of a petition to them signed by a majority of resident and non-resident persons, being the owners of the lands to be taxed; and whose lands would be benefited by the construction of the said ditch or drain; and that the defendants' engineer did not make a proper examination of the lands to be benefited before preparing his plans, specifications, detailed estimates and report required by the provisions of the said Drainage Act; that a sufficient number of names were not subscribed to the said petition for the purpose of giving the defendants jurisdiction in order to enable them to legally pass said by-law; that the defendants had no power or au-

thority under the said Drainage Act, nor was jurisdiction granted them under said petition so filed, sufficient to enable them to construct or cause to be constructed the branch drains referred to in the said alleged report prepared by the said township engineer; that the defendants were trespassers in attempting to construct the said drain on the plaintiff's lands; that the defendants did not carry the said drain to a proper and sufficient outlet, by reason of which the said drain is imperfect, and unfit for the purpose for which it was intended; that the defendants so constructed the said ditch or drain that it will be of no benefit or use to the plaintiff, but on the contrary, a great injury thereto; that in the construction of the said ditch or drain the defendants did not observe the proper course upon which the said ditch or drain should be constructed, but on the contrary diverted the water from its natural flow or outlet, and constructed upon such a course through the plaintiff's lands as to permanently damage them by making excavations and creating obstructions to the proper use of the plaintiff's lands; that since this action has been commenced the defendants have let contracts for the construction of the said ditch or drain, and the contractors for the same, under the direction of the defendants, have entered upon the plaintiff's land and have committed damage thereto; that the said ditch or drain as now constructed is a permanent injury to the lands of the plaintiff, as it runs through the same circuitous route, and will therefore necessitate the construction and maintenance of many small bridges and crossways, and create other obstructions and inconveniences to the use of the plaintiff's land, and thus deteriorating the value of same; that the defendants are trespassers in entering upon the lands, and in authorizing, or assuming to authorize, their contractors so to do inasmuch as they did not observe the legal formalities and provisions of the Drainage Act of 1894, and amendments thereto, necessary to give them power and jurisdiction to construct the drain; that the said by-law is null and void, as against the plaintiff, for the reasons hereinbefore set out, and that all work, proceedings and acts done thereunder are illegal; that

under the said by-law the said defendants imposed a tax upon the plaintiff as a contribution, as to the construction of the said drain, and this the plaintiff alleges is illegal; that no proper and sufficient outlet has been obtained for the waters so brought upon the plaintiff's lands; that a more direct, less expensive, and better course could have been obtained by following the natural flow of the water, and by constructing said ditch in a manner which would cause no damage and inconvenience to the plaintiff. And the plaintiff claims:—

1. A declaration that the report of the township engineer and the by-law passed by the defendants pursuant to the same are, and is null and void, and of no effect, and the same are not, nor is either of them binding on the plaintiff.

2. A declaration that the assessment made under the said by-law was and is void and of no effect, and not binding on the plaintiff, or on said lands, or any of them.

3. A mandatory order directing the defendants to repair the damage already committed, and for an injunction enjoining the defendants from committing further damage or trespass to, or upon the plaintiff's lands.

4. The sum of \$2,500 for the past damage committed by the defendants, by reason of the construction of the said drains and culverts first above mentioned, and the sum of \$1,000, for permanent injury committed upon the plaintiff's land, by reason of the construction of the said drain under the said alleged by-law.

The defendants by their statement of defence deny all the allegations in the statement of claim, except those therein expressly admitted; they deny that they wrongfully diverted to or brought upon the plaintiff's land, any quantity of water, causing the plaintiff any damage, and aver that the culverts constructed by them were constructed with the knowledge, consent and approval of the plaintiff; that the claim of the plaintiff is barred by the Statute of Limitations; and that the by-law was passed in valid exercise of the powers of the defendants under the Drainage Act, 1894, and after due compliance with all necessary statutory requirements under said Act; that the plaintiff, although duly served with all

proper notices under said statute, in connection with the passing of said by-law, did not within ten days after the final passing thereof serve any notice upon the reeve of the defendant municipality of his intention to make application to quash said by-law as provided by section 21 of said Act: nor did the plaintiff within six weeks ensuing the final passing of said by-law make any application to quash the same as provided by said section 21; that the defendants have gone to large expense in constructing said drainage scheme, and have issued debentures for a considerable sum of money to provide for a portion of such expense, pursuant to the powers contained in said statute.

The action was, under the provisions of the Drainage Trials Act, referred to the Drainage Referee, and was tried before him, and he gave judgment dismissing it with costs. From that judgment the plaintiff appeals. The facts were these:—

The plaintiff's land is situate to the north of and adjoining the highway, between the 4th and 5th concessions of Oxford, and forms a part of lot 8 in the 4th concession of the said township. The lot is low, flat land, lower than the lands to the south, south-west and west, and east. A creek, known as Morrison's Creek, takes its rise about the centre of the west half of the lot, and extends in a north-easterly direction to the Rideau River.

The surface waters from a large area to the south and south-west of the concession drain and a portion of the waters from the east and west, north of the concession drain, flowed naturally in, upon, and over the lot, and found an outlet in the creek. On each side of the highway there was a drain or ditch constructed for the purposes of the highway.

As the lands in the fifth concession, south of the highway, were improved the occupants constructed ditches or drains which had the effect of conducting and discharging their waters into the concession drain on the south side of the highway, with the design of protecting the road from part of the water so brought into it. The defendants at different times, between the years 1876 or 1877 and the year 1882, constructed three culverts so as to connect the drain on the south

side of the highway with that on the north side thereof. These three culverts were to the west of the plaintiff's land.

The plaintiff called a meeting of those persons interested in the concession drain—that is to say,—the persons who used it as an outlet for the waters of their farm drains—to consult with respect to the construction of a drain on his own land, and which would relieve the concession drains; and it was then verbally agreed, that eight of the persons who attended the meeting would dig a ditch on the plaintiff's land ten rods long, three feet wide and eighteen inches deep, commencing at the concession road, and extending north on the plaintiff's land, and the plaintiff agreed that he would procure the defendants to construct a culvert from the ditch on the south side of the concession road to the ditch so agreed to be constructed by the neighbours. The work was done.

The culvert then constructed may be designated as culvert No. 2; it was east of, but close to the west limit of the plaintiff's land, and connected the drainage work under the agreement with the north concession ditch.

Thereafter on the 9th of September, 1889, the plaintiff, assuming to Act under the Ditches and Watercourses Act, notified in writing the persons interested as aforesaid in the concession drain, that he required to construct a ditch on his land, and requested them to attend at his lot on the day and hour therein named for the purpose of agreeing, if possible, upon the respective portions of such ditch or drain to be made, deepened or widened by the several parties interested. At this meeting it was agreed that those present, except the plaintiff, would widen the ditch constructed in 1886 to a width of eight feet, and deepen it to a depth of three feet, and that they would extend it ten rods north to Welch's land, where it would connect with Morrison's Creek: this work was also done. The defendants contributed \$15 towards the cost of that part of the work on Welch's land. The drain on the south side of the road was cleaned out in the year 1886. The plaintiff does not claim that he sustained any damage by reason of the drain, or the three culverts, up to the time when the concession ditch was cleaned out in 1886. The



drain which the neighbours constructed in 1886 and subsequently enlarged and extended, was intended to relieve the plaintiff's lands from the waters then complained of, and it appears to have been effective, as the plaintiff admits that he sustained no great damage until the year 1891.

The culvert, which may be designated No. 1, was also for the purposes of the highway constructed by the defendants in the year 1892; it crosses the road a short distance west of the east limit of the plaintiff's land, and connects the ditch on the south side of the road with the ditch on the north side thereof.

A petition of property owners praying for the drainage of the area therein described was, on the 12th of August, 1895, presented to the council, and was, by resolution of the council, referred to an engineer (J. S. Brown) with the usual instructions under section 3 of the Drainage Act.

On the 28th September following, he made his report to the council recommending a scheme, estimating the cost and making an assessment.

Afterwards, it was found that the petition was not signed by the number of property owners necessary to give the council jurisdiction under the Act to pass a by-law to provide for the construction of the work.

Thereupon, on the 12th October, 1895, a new petition for the same work was prepared and sufficiently signed, and this petition was referred to the same engineer, with the same instructions. He took the oath prescribed by the statute, and on the 15th of the same month made his report, &c., to the council.

On the 16th November, 1895, the council passed a provisional by-law, adopting the engineer's scheme as reported. The report, specifications, estimates and assessment schedule are set out in full in the by-law, which was duly published, and the time and place for holding a Court of Revision fixed.

The plaintiff appealed to the Court of Revision against the assessment of his lands, and the assessment was reduced by the Court from \$75.50 to \$35.50. He then appealed from this decision to the County Judge, who dismissed it.

The by-law was finally passed on the 30th of May, 1896. No application has ever been made to quash the by-law, nor has any notice of an intention to make such an application been given.

The writ was issued before any work was done under the by-law.

The drain has been completed, and the debentures issued under the authority of the by-law have been sold.

I am of opinion that this appeal ought not to be allowed. I do not, however, base my judgment upon the broad proposition upon which the learned Referee seems to have proceeded, viz., that a proprietor has no redress for damage occasioned by the action of a municipality in so constructing the road drains and culverts as to divert the surface water and turn the same on to the lands of an adjoining proprietor; but upon the ground that the plaintiff had failed to make out a case, which entitled him in this action to either damages, or the other relief asked for. The five culverts were constructed with the object of improving and preserving the road. Three of them were constructed many years ago, and resulted in no injury to the plaintiff. The fourth was constructed by the defendants at the request of the plaintiff, with the design of carrying the water from the road drains into the drain on the plaintiff's land, which drain was, in 1889, enlarged, and extended by the plaintiff's neighbours and the defendants, so that its capacity was increased nearly, if not quite three-fold, and it was carried to a proper outlet, namely, Morrison's Creek.

In 1892 the defendants constructed the fifth culvert for the purpose of carrying water from the south to the north drain. Up to the time of the construction of this culvert, it is, I think, clear that the plaintiff could not maintain an action for damages due to the culverts before then constructed. Assuming the construction of this culvert to have been a negligent, or improper act on the part of the defendants, I do not think the plaintiff has at all established that damage to an appreciable, or calculable, amount resulted therefrom. It is indeed hard to reconcile the statement of the plaintiff

in his notice of appeal against the assessment of his lands for part of the expense of the drainage work, known as the Upper Morrison Creek Drainage Improvement By-law; in which he says, "As to benefit, I hold that I receive none, and as to outlet, that I have always had ample fall and outlet; and as proof of it I have had my place thoroughly drained for years,"—with his conduct, in now claiming damages for the flooding of his lands by the waters of the road drains.

It is undisputed that this action was begun before any work was done, under the impugned by-law, and it was admitted at the trial, that except, in so far as the construction of the drain itself was concerned, the plaintiff suffered no damage which could be attributable to it, except damage from April, 1897. It is clear that the plaintiff cannot maintain this action for damages due to anything done under the by-law. The plaintiff assails the by-law, mainly, upon the ground that it is not founded upon a petition sufficiently signed. The Referee has found against him on this point, and I agree with his finding. It seems to me that the several requirements of the statute in relation to by-laws of this character, and necessary to give them validity, have been sufficiently complied with here. I can see no reason for doubting its validity, and am of opinion that it conferred upon the defendants authority to construct the drain.

The plaintiff does not complain that the work of construction was negligently or unskilfully done, but his complaint is, that the engineer's plan adopted by the defendants is defective and inefficient, in this, that a more direct, less expensive, and better course, and one which would cause no damage to the plaintiff, could have been obtained by following the natural course of the water. For this the defendants are not liable if they, acting in good faith, adopted and carried out the engineer's plan; and there is no evidence, and it is not contended, that they were not acting in good faith: See *Williams vs. Raleigh* (1).

If in the construction of the drainage work, or consequent thereon, the plaintiff has suffered injury, he is not without a remedy.

COURT OF APPEAL, ONTARIO.

MACKENZIE VS. TOWNSHIP OF WEST FLAMBOROUGH.

(Reported 26 O. A. R. 198.)

*Want of Repair—Act of God.*

Where a drain is out of repair and lands are injured by water overflowing from it, the municipality bound to keep it in repair cannot escape liability on the ground that the injury was caused by an extraordinary rainfall, unless it is shewn that even if the drain had been in repair the same injury would have resulted.  
Judgment of the Drainage Referee reversed.

Appeal by the plaintiffs from the judgment of the Drainage Referee, reported at p. 353, Clarke & Scully's Drainage Cases, Vol. 1.

The following statement of the facts is taken from the judgment of LISTER, J.A.:—

The action was commenced on the 2nd of September, 1898, and was brought to recover damages, which the plaintiffs allege they have sustained, occasioned by the overflow of water upon their property, consisting of the south half of lot 12 in the 5th concession of the township of West Flamborough, caused, as they allege, by the neglect of the defendants to maintain and keep the drain mentioned in the proceedings in repair, and for a mandamus.

The defendants, by their statement of defence, deny that the damage complained of was caused by the overflow of water from the drain, and they aver that in any event they are not liable for the damage (if any) sought to be recovered. They assert that if any damage was done to the plaintiffs' lands and crops, it was caused by exceptionally heavy rains and from surface water, and not from the overflowing or flooding of the drain.

The action came on for trial before the Drainage Referee, to whom it had been referred under the provisions of the Drainage Trials Act, and the learned Referee, at the close of the evidence, pronounced judgment dismissing the action,

on the ground that the damage complained of was caused by *vis major*.

The facts were these: The drain complained of was constructed by the defendants in the year 1889 under the authority of the drainage provisions of the Municipal Act then in force, and of a by-law of the council of the defendant corporation passed on the 18th day of January, 1889, the schedule to which shews that the plaintiffs' land was assessed for benefit.

As early as the month of November, 1895, the defendants were notified in writing that the drain was out of repair, and in the month of May, 1896, a formal notice was given to the defendants by the plaintiff Gordon, informing them that the drain was so much out of repair as to cause damage to the plaintiffs' crops, etc., and requiring the defendants to have the same cleaned out and otherwise repaired.

No action was taken by the defendants until the 2nd of October, 1896, when they, by resolution, directed the township engineer to examine the drain, report on the repairs necessary, and assess the amount to be paid by the various parties interested.

The engineer during the same month made his report to the council, in which he states: "I find that almost the whole of the said drain is very much out of repair, having become filled in from various causes in places to such an extent as to seriously detract from the usefulness thereof." And by the same report he estimated the cost of carrying out the repairs at \$1,325.34, and assessed the plaintiffs' land at the sum of \$90.

The defendants, on the 15th of December, 1896, passed a by-law authorizing the carrying out of the repairs recommended by the engineer, but did not commence work until September, 1897, after the commencement of this action, and the work was completed in November following.

During the night of the 26th of July, 1897, an exceptionally heavy rain began to fall, and continued for several days; some of the witnesses say three or four days, while others say from eight to ten days.

The plaintiffs' land was flooded and portions of their crops destroyed, and other portions damaged by such flooding, and the plaintiffs claim that the injuries thus suffered were caused by the failure of the defendants to keep the drain in repair.

The appeal was argued before Burton, C.J.O., Osler, Maclellan, Moss, and Lister, J.J.A., on the 23rd, 26th, and 27th of January, 1899.

George Lynch-Staunton, and W. A. Logie, for the appellants. The drain in question was undoubtedly allowed to remain out of repair, and the appellants are entitled at the least to compel the defendants to put it in repair, so that the dismissal of the action is wrong. The plaintiffs are also entitled to damages. It is admitted that water from the drain came on their lands and the defendants have failed to make out that the water would have come there if the drain had been in repair. The doctrine of *vis major* has, therefore, no application. *Noble vs. City of Toronto* (1), has been relied on, but in that case there was no negligence shewn. *McArthur vs. Town of Collingwood* (2), also relied on, is distinguishable for the same reason. The true rule is stated in *Nitro-Phosphate, etc., Co. vs. London and St. Katharine Docks Co.* (3).

Watson, Q.C., and A. R. Wardell, for the respondents. The appellants' case is not made out; their land was not in fact damaged by water from the drain, or at all events if there was any overflow it was caused by the extraordinary rain-fall, and the respondents are not liable.

George Lynch-Staunton, in reply.

May 9th, 1899. The judgment of the Court was delivered by

Lister, J.A.:—

I think the plaintiffs are entitled to judgment. The defendants having constructed the drain, the statute imposed

(1) (1882) 46 U. C. R. 519.

(2) (1885) 9 O. R. 368.

(3) (1878) 9 Ch. D. 503.

on them the duty of maintaining, preserving and keeping it in repair, and for failure to discharge the duty thus imposed, they became, under sec. 73 of the Municipal Drainage Act, liable to the plaintiffs in pecuniary damages, and also to a mandamus to compel them to repair and maintain the drain. The terms of the section are: "Any municipality neglecting or refusing to maintain any drainage work as aforesaid, upon reasonable notice in writing from any person or municipality interested therein, and who or whose property is injuriously affected by the condition of the drainage work, shall be compellable by mandamus issued by the Referee or other Court of competent jurisdiction to maintain the work, unless the notice shall be set aside or the work required thereby varied as hereinafter provided, and shall also be liable in pecuniary damages to any person or municipality who or whose property is injuriously affected by reason of such neglect or refusal:" see *Corporation of Raleigh vs. Williams*(4).

It may be observed that the plaintiffs do not complain of the drain as originally constructed, but rest the liability of the defendants upon their negligent failure to maintain and keep it in repair.

That the drain at the time of the injuries complained of was, and for a considerable time prior thereto had been, to the knowledge of the defendants greatly out of repair, is, upon the evidence, beyond controversy. It therefore follows that the defendants having failed to perform their statutory obligation were guilty of negligence, and are liable to the plaintiffs in this action for such damages as they may have sustained by reason of such negligence.

It was not contended by counsel for the defendants that they had discharged their statutory duty by keeping the drain in repair, but the contention was that the injuries complained of were occasioned by *vis major*.

Upon the authorities I think it clear that the defendants cannot exonerate themselves on the ground of *vis major* without clearly proving that the injuries complained of not

only might, but must have, happened independently of their neglect. The principle as applicable to the present case is fully settled by the case of Nitro-Phosphate, etc., Co. vs. London and St. Katharine Docks Co. (5), affirmed in appeal, which, as set out in the head-note, was brought to recover damages occasioned by the neglect of the defendants to maintain a bank on their dock four feet high. At one point the bank was several inches below the level of four feet. An extraordinary high tide took place and the river rose to four feet five inches, in consequence of which the water overflowed the bank and damaged the property of a neighbouring proprietor. The tide had never been known to rise so high. It was held that the defendants were bound to keep their bank up to the level of four feet, and that they were liable to the plaintiffs for breach of their statutory duty in not doing so. It was also held that the extraordinary high tide, although an act of God, did not excuse the defendants from their liability, but that they ought to have an opportunity of shewing that the damage done by the act of God, and the damage done through their negligence, ought to be apportioned. "I hold, therefore," said Mr. Justice Fry, at p. 517, "that the statute imposed on the defendant company an obligation to maintain the upper surface of the bank which was to retain the water in their dock at a level of four feet above Trinity high water mark. It is conceded that they did not so maintain it. The result, in my opinion, is that there has been negligence on their part in not fulfilling their statutory obligation, and that they are responsible for that negligence." And further on he says: "I am clear that a defendant cannot avail himself of the act of God as an excuse when he has not done his own duty, except in cases in which he can make it apparent and plain to the Court that, if he had done his duty, damage would still have followed to the plaintiffs. Now that burthen the defendants have, in my opinion, not discharged in the present case." And again, he says: "The case, therefore, is one in which, in my opinion, negligence



is brought home to the defendants, in which I cannot tell whether any portion of the damage did or did not result from the act of God, in which the defendants have prevented me from telling what the effect of the act of God would have been if they had done their duty."

The negligence of the defendants having been proved, they, under the defence which they have set up, were bound, as said by Mr. Justice Fry, "to make it apparent and plain to the Court that if they had done their duty damage would still have followed to the plaintiffs." I am of opinion, without particularizing the evidence, that it fails to establish the contention of the defendants. It may be that if the defendants had fulfilled their statutory duty, the plaintiffs would, notwithstanding, have suffered some injury, but I think, looking at the whole evidence, that the then condition of the drain was the substantial cause of the damage.

But apart from the question of damage caused from the overflow of water, the action upon the evidence was well brought for a mandamus, and if it be true that at the time of the trial the repairs had been completed, the plaintiffs were nevertheless entitled to judgment for nominal damages and their costs of suit.

The cases of Noble vs. City of Toronto(6), and McArthur vs. Town of Collingwood(7), do not, in my opinion, sustain the defendants' contention on the question of *vis major*. In neither case was negligence on the part of the defendants established, and a new trial was in each case ordered for the purpose of taking the opinion of the jury on the question of negligence.

In the present case the defendants' neglect to perform their statutory duty to keep the drain in repair has been proved.

The damages to which the plaintiffs are entitled cannot be estimated with any degree of accuracy. The cultivated portion of the land at the time of the injury comprised about twenty acres. The whole lot is low and forms part of what

at one time was a swamp, and it is quite likely that in time of heavy rain, crops growing on it would be damaged to some extent irrespective of the condition of the drain. I think upon the whole evidence \$200 would be a fair and reasonable amount at which to assess the damages.

It follows that the appeal should be allowed, the judgment of the Referee reversed, and judgment entered for the plaintiffs for \$200 damages with costs of action, less their costs of the day on the adjournment on the motion to amend. The plaintiffs must pay the defendants their costs of the day on the same adjournment; all of such costs to be taxed on the County Court scale. The defendants must also pay the costs of this appeal.

*Appeal allowed.*

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## COURT OF APPEAL, ONTARIO.

YOUNG VS. TUCKER.

(Reported 26 O. A. R. 162.)

### *Water and Watercourses—Cultivation of Land.*

While the owner of land has an undoubted right to drain it in the ordinary course of husbandry, he must take care that any water collected by his drains is carried to a sufficient outlet, and if the water is drained into a pond which is not large enough to hold the additional volume of water thus brought into it, he is liable in damages to a person whose land is flooded by water overflowing from such pond.

Judgment of the Drainage Referee reversed.

This was appeal by the plaintiffs from the judgment of the Drainage Referee.

The plaintiffs and the defendant were farmers residing in the township of Moore, and the plaintiffs' complaint was that the defendant in draining his farm brought water upon theirs. The facts sufficiently appear in the judgments.

The action was referred to Mr. Hodgins, Q.C., the Drainage Referee, and was tried before him on the 26th and 27th of April, 1898. The judgment given by him at the close of

the plaintiffs' case is reported at p. 356, Clarke & Scully's Drainage Cases, Vol. 1.

The plaintiffs' appeal from this judgment was argued before Burton, C.J.O., Osler, MacLennan, Moss, and Lister, JJ.A., on the 18th and 19th January, 1899.

Aylesworth, Q.C., and F. W. Kittermaster, for the appellants. The learned Referee having found that by reason of drains constructed by the defendant, surface water which would not otherwise have come to plaintiffs' land at all, was brought to and discharged upon the plaintiff's land, should have held that the plaintiffs were entitled to the relief asked for: *Ostrom vs. Sills*(1). The plaintiffs' drain was a private drain, and the defendant contributed nothing to its construction or maintenance, and had no right to make use of it for draining his land: *Williams vs. Richards*(2). If the defendant desired to drain his land through the plaintiffs' farm he should have taken proceedings under the Drainage Act. It is clearly established that the defendant's drains have the effect of bringing water with increased velocity and in greater volume to the plaintiffs' land, and that thereby the plaintiffs have suffered damage. For this damage the defendant is liable: *Malott vs. Mersea*(3), *Derinzy vs. Ottawa*(4).

A. Weir, for the respondent. The appellants' damage, if any, arose from their own acts in constructing a large ditch, which, by subsequent extensions made without the privity of the respondent, tapped and diverted several large swales, and in making and allowing others than the respondent to make extensive drainage works which brought water into the ditch the overflow of which is alleged to have caused damage to the appellants. It is proved that the water from the respondent's lands and drains could not reach the locality where the damage is alleged to have been done, except through ditches and drains constructed by intervening owners, and the respondent is not liable. Moreover, what was done by the respondent was done in the course of good husbandry,

(1) (1897) 24 A. R. 526.

(2) (1893) 23 O. R. 651.

(3) (1885) 9 O. R. 611.

(4) (1887) 15 A. R. 712.

and any water leaving his hands passed away in its natural course, and no action lies: McCormick vs. Horan (5), Meixell vs. Morgan (6), Peck vs. Goodberlett (7), Broadbent vs. Ramsbotham (8).

Aylesworth, in reply.

March 14th, 1899. Burton, C.J. O.:—

If the injury complained of had been caused by the cultivation of the defendant's own land in the ordinary course of husbandry, I should agree with the learned Referee that it would be *damnum absque injuria*, for which no action could be maintained, but here the evidence establishes that the defendant made an artificial drain which brought water down from his own land into a swale, or, as the learned Referee describes it, a natural reservoir, which would not otherwise have gone there at all, causing the water in that reservoir to overflow into the drains of Mason, and thence over the plaintiffs' land. I am unable to agree that no action lies because the artificial watercourse is not continued into the plaintiffs' land. I think the defendant is equally liable if by reason of his act the water in the reservoir is made to overflow upon the plaintiffs' land, causing him damage. I think, therefore, that the appeal should be allowed, but I think justice will be done by granting the injunction and nominal damages with costs and the costs of this appeal.

Lister, J.A.:—

It was proved that the plaintiffs were owners and occupants of the east half of lot 10, in the first concession of the township of Moore, and that the defendant was owner and occupant of lot 8 in the second concession of the same township, his lot being to the north and east of the plaintiffs'; that the plaintiffs, in or about the year 1880, constructed on their farm an open drain extending east and west, and finding its outlet to the west; that Mason, who owns the lot to

(5) (1880) 81 N. Y. 86.

(6) (1892) 149 Pa. St. 415.

(7) (1888) 109 N. Y. 180.

(8) (1856) 11 Ex. 602.

the east of the plaintiffs', constructed an open drain on his lot extending east and west, and connected the same with the plaintiffs' open drain, using the same for his outlet; that he also constructed an open drain for a distance of thirty rods north from and connected with the open drain, and connected the north end of the ditch with a tile drain, which he extended up to, or nearly up to, the north end of his lot.

It was also proved that on the defendant's lot is a well defined depression commencing on the north-east portion thereof, and extending south-westerly to the dividing line between his lot and that of Campbell's, and thence in the same course on Campbell's land to the south-westerly part thereof, where there is a large marsh or swale extending over on Mason's land to the south.

This depression, except where separated by ridges crossing it, is continuous, and is indicated by the red line on the plan filed. A witness described it as "a chain of swales with ridges intervening." On the defendant's land to the east of this depression, or chain of swales, is another well defined depression or continuous swale, extending in a southerly direction through the first concession of Moore to the east of the plaintiffs' land, and this depression is indicated by a blue line on the same plan.

It was further proved that prior to the construction of the ditch complained of, the whole or greater portion of the surface water from rain or snow, which gathered in the first mentioned depression on the defendant's land, was by reason of the ridges diverted into the eastern depression and flowed south and east of the plaintiffs' land. The evidence shews that in the year 1889 or 1890 the defendant constructed a ditch in the line of the first mentioned depression, not only through his own land but through Campbell's land (apparently with Campbell's consent) to the marsh or swale in Campbell's land, and the effect of this drain was to collect the surface water on the defendant's land and discharge the same in accumulated volume and force into the swale or marsh on Campbell's land. It was proved that the defendant admitted that in draining to the marsh he intended the water

should go to the plaintiffs' drain, and that he drained 120 acres of his land to the plaintiffs' drain. I think the evidence established that prior to the construction of the drain complained of, the plaintiffs' drains were sufficient for the purposes of their farm. It seems clear on the evidence that the marsh or swale on Campbell's land was not sufficient to contain, and did not contain, the additional water discharged into it by the defendant's drain, and in consequence thereof from time to time between 1890 and 1897 it overflowed, and the ditches of the plaintiffs' drain being inadequate to carry off the water which flowed down from the swale or marsh, the plaintiffs' land was overflowed and flooded, causing damage to their crops and otherwise.

I am unable to assent to either proposition of the learned Referee. Neither, in my judgment, can be sustained by authority.

The fact that the water was not carried in a continuous drain from the land of the defendant to that of the plaintiffs is, as it appears to me, immaterial, and affords no answer to this action.

The marsh or swale on Campbell's land into which the water from the drain complained of discharges, is as much the property of Campbell as any other part of his lot.

The contention of the defendant and the finding of the Referee that the defendant had a legal right to drain into the swale as being a natural reservoir, would, if good law, amount to a practical confiscation of his property. Such, I venture to say, is not the law. The act of the defendant in discharging the water from the drain into this swale is undoubtedly an invasion of Campbell's rights if done without Campbell's consent. It would appear from the evidence that such consent was given. But if the marsh or swale is insufficient to hold and contain the water so discharged into it, and other proprietors should be injured by the water so brought down overflowing and flooding their lands, the defendant, in my opinion, would be answerable in damages for the injury caused thereby.

The question here is not one of draining into a natural watercourse, nor is it the question raised and determined in the case of *Ostrom vs. Sills* (9) which was an action between adjoining owners involving the legal right of the dominant owner to discharge surface water falling on his land on the land of the servient owner.

But the question is: Assuming the marsh or swale to have been insufficient to contain and hold the water so brought down and discharged into it by the defendant's ditch, and that in consequence it overflowed and flooded the lands of other proprietors, would the defendant be liable to such proprietors for the damages sustained?

The right of the defendant to drain his land by ditches is undoubted, but with this right is the correlative obligation to so construct them as to conduct the water which may be carried thereby to a proper and sufficient outlet, so that the water which may be discharged therefrom will do no injury to other proprietors. Anything short of this must, I think, be regarded as negligence for which the defendant would be answerable.

The governing principle in cases such as this is, that one cannot prevent injury to his own property by transferring that injury to his neighbour's property.

This principle is illustrated in the case of *Whalley vs. Lancashire and Yorkshire R. W. Co.* (10), the facts, as set out in the headnote, being these: "The plaintiff was a farmer in the occupation of lands to the north-west side of the railway, but separated from it by lands belonging to other persons; the water, by reason of an unprecedented rain storm, had so risen as to expose the defendants' embankment to danger; the defendants caused trenches to be made in the embankment by which the water was enabled to escape to the north-west side of the railway, and from thence flowed into the adjoining land, and ultimately to that of the plaintiff, where it damaged his crops. It was held that the defendants had no right to protect their property by transferring the mis-

(9) (1897) 24 A. R. 526, (1898) 28 S. C. R. 485.

(10) (1884) 13 Q. B. D. 131.

chief from their own land to that of the plaintiff, and that they were therefore liable." Brett, M.R., said: "But now comes this question, the danger has not been brought by a person on his own land, but it has come there—an extraordinary danger, which, if left standing there, will injure his property, but not that of his neighbour. Can he then, in order to get rid of and cure the misfortune which has so happened to himself, do something which will transfer that misfortune to his neighbour? That seems to me to be contrary to the well-known maxim that you must not, when you have the choice, elect to use your property so as to cause injury to your neighbour . . . The defendants did something for the preservation of their own property which transferred the misfortune from their land to that of the plaintiff, and therefore it seems to me that they are liable." Baggallay, L.J., said: "The defendants could have left the water to take its own course, and then, if it had produced any amount of damage to the plaintiff, I really do not see how, under the circumstances, he could have had any right against them. But, on the other hand, if, without leaving the water to take its own course, they take upon themselves to do that which they think best (whether they think it best for themselves, or their neighbour, or both), they must take the risk of that which they do being found by the jury, however reasonably done as regards their own embankment, to have caused damage to the neighbour whose land the water so flowed over."

In *Smith vs. Fletcher* (11), Bramwell, B., in delivering judgment in the Exchequer Court, at p. 309, said: "The defendants have artifiically caused foreign water to get into the plaintiffs' mine, water which did not arise there nor get there by mere natural causes, water which got there not by the defendants not preventing, but by their causing it." See also *Rylands vs. Fletcher* (12), *Attorney-General vs. Tomline* (13), *Geddis vs. Proprietors of Bann Reservoir* (14),

(11) (1872) L. R. 7 Ex. 305, (1877) 2 App. Cas. 781.

(12) (1868) L. R. 3 H. L. 330. (13) (1879) 12 Ch. D. 214.

(14) (1878) 3 App. Cas. 430.



Fleming vs. Mayor and Corporation of Manchester (15),  
Nicholl vs. Mulkear Drainage Board (16).

The Chancellor in the course of his judgment in Northwood vs. Township of Raleigh (17), said: "If an individual collects surface water dispersed over his land, which would naturally disappear by absorption or evaporation, and by means of a trench carries it off in a stream so as appreciably to injure his neighbours, he commits an unlawful act." See also Stalker vs. Township of Dunwich (18), Township of Ellice vs. Hiles (19).

In the case of Pettigrew vs. Village of Evansville (20), Dixon, C.J., expressed himself thus: "The gist of the complaint was, that the digging of the ditch would turn the waters of the pond upon the land of the plaintiff, greatly to his injury; and that fact the Court found, and it is not controverted by counsel. And we cannot assent at all to the position of counsel, that because the ditch was not to be extended quite up to the plaintiff's line, and the water conducted upon his land in that manner, the injury was of that indirect and consequential kind for which the village is not responsible. It was an injury as direct as if such had been the mode in which the water was to be conducted, and there can be no rational ground for discrimination. He who sets in motion a destructive or injurious element, as fire or water upon his own land, knowing that it must immediately pass upon the land of his neighbour to his damage, commits a direct injury, and cannot, as counsel seem to suppose, claim exemption from liability, or escape the consequences, on the ground that the wind blew the fire, or the law of gravitation caused the water to run." See also Field vs. Town of West Orange (21), and Gregory vs. Bush (22).

The evidence shews that the ditch conducted and discharged into the swale on Campbell's land a very considerable volume of water which would not otherwise have come

(15) (1881) 44 L. T. N. S. 517. (19) (1894) 23 S. C. R., at p. 446.

(16) (1880) 6 L. R. Ir. 45.

(20) (1870) 35 Wisc. at p. 236.

(17) (1882) 3 O. R., at p. 358.

(21) (1888) 2 Atl. Rep. 236.

(18) (1888) 15 O. R. pp. 344, 345. (22) (1887) 64 Mich. 37.

there; that the swale or marsh was not a proper and sufficient outlet for the water so brought down and discharged there; and that the plaintiffs were injured by the water from the swale overflowing and flooding their land.

What the defendant did was negligently done, and he is, therefore, answerable for the consequences of that negligence.

Applying the principle illustrated in the cited cases to the facts of the present case as proved, it seems clear that the learned Referee erred in dismissing the action.

Though the plaintiffs have been injured by the act complained of, it is not easy to estimate with any degree of exactness the amount of the damages.

During the argument at bar, it occurred to me that the chief object of the plaintiffs in bringing this action was to have their rights, in respect of the drain complained of, declared by the Court.

Having regard to all the circumstances of the case, it is in my opinion, a proper one to be finally disposed of by this Court.

I think that the judgment or report of the Referee should be so varied as to enjoin the defendant from discharging the water from his land into the swale or marsh on Campbell's land, and that the defendant should pay to the plaintiffs \$25 as damages for the injuries complained of, and their costs of the action.

The defendant should pay the costs of this appeal.

Osler, MacLennan, and Moss, JJ.A., concurred.

*Appeal allowed.*

NOTE.—Appeal to Supreme Court quashed, see next page.

## SUPREME COURT OF CANADA.

WILLIAM S. TUCKER (DEFENDANT)....APPELLANT;

AND

|                             |   |              |
|-----------------------------|---|--------------|
| WILLIAM YOUNG AND JOHN      | } | RESPONDENTS. |
| W. YOUNG (PLAINTIFFS) ..... |   |              |

(Reported 30 S. C. R. p. 185.)

ON APPEAL FROM THE COURT OF APPEAL FOR  
ONTARIO.*Appeal—Jurisdiction—Case Originating in County Court—Transfer  
to High Court.*

There is no appeal to the Supreme Court of Canada in a case in which the action was commenced in the County Court and transferred by order to the High Court of Justice in which all subsequent proceedings were carried on.

Per Gwynne, J., contra. Where the cause is transferred because the pleas ousted the County Court of jurisdiction an appeal lies.

Leave to appeal cannot be granted under 60 & 61 Vict. ch. 34, sec. 1 (e), in a case not appealable under the general provisions of R. S. C. ch. 135.

Appeal from a decision of the Court of Appeal for Ontario (1) reversing the ruling of the Drainage Referee who dismissed the plaintiff's action.

The action was begun by a writ issued out of the County Court of the County of Lambton to recover damages for injury to plaintiff's land by water brought upon it from drains constructed by the defendant on his own land. Defendant pleaded, *inter alia*, want of jurisdiction in the Court, and, as soon as issue was joined, the cause was transferred to the High Court of Justice by order of the County Court Judge exercising jurisdiction of a local Judge of the High Court. The order of transfer states that the jurisdiction of the County Court was properly and *bonâ fide* brought in question.

PRESENT: Sir Henry Strong, C.J., and Taschereau, Gwynne, Sedgewicke and King, JJ.

(1) 26 Ont. App. R. 162.

At the trial a reference was ordered to the Drainage Referee, who held that plaintiff had no cause of action, which holding was reversed by the Court of Appeal on appeal from his report.

On the appeal to the Supreme Court coming on for hearing, counsel for respondent moved to quash for want of jurisdiction, claiming that the action did not originate in a Superior Court.

Aylesworth, Q.C., for the motion.

Riddell, Q.C., contra, argued that the case did originate in a Superior Court, but if not, that leave to appeal should be granted under 60 & 61 Vict. ch. 34, sec. 1 (e).

The Chief Justice (oral) :—

Section 24 (a) of the Supreme and Exchequer Courts Act gives jurisdiction to this Court to entertain appeals “from all final judgments of the highest Court of final resort . . . in cases in which the Court of original jurisdiction is a Superior Court.” And section 28 gives jurisdiction in appeals from final judgments “in actions, suits, etc., originally instituted in a Superior Court of the Province of Quebec, or originally instituted in a Superior Court in any of the Provinces of Canada other than the Province of Quebec.”

As we have no jurisdiction unless the case in appeal originated in the Superior Court, how can we entertain this appeal? The institution of a suit is the writ bringing the defendant into Court, and the writ in this case issued out of a County Court. This objection cannot be got over by saying that some subsequent proceeding in the cause was equivalent to what the Act requires. The appeal must be quashed.

Taschereau, J.:—

I am also of opinion that the appeal must be quashed as the case did not originate in a Superior Court.

As to the motion for special leave to appeal under subsection (e), section 1 of 60 & 61 Vict. ch. 34, it clearly cannot

be granted. That enactment merely gives us the right to grant special leave in that class of cases which were previously appealable, but which are by that Act 60 & 61 Vict. ch. 34, decreed not to be thereafter appealable *de plano*, and this is not a case of that class.

Gwynne, J. (dissenting) :—

I agree with Mr. Justice Osler that this case must be regarded as having originated in a Superior Court within the meaning of the section of the Act regulating appeals to this Court from the judgments of a Superior Court. True it is that the plaintiff had commenced an action in the County Court of the County of Lambton to which the defendant pleaded pleas which ousted all jurisdiction of the County Court, whereupon all proceedings then had in the County Court ~~were~~, by reason of the absence of jurisdiction in the County Court ~~to entertain~~ the matter, transferred to the High Court of Justice as ~~the only~~ Court having jurisdiction in the matter under the provisions of ~~section~~ 186, R. S. O. (1897), ch. 51. Now it is from a judgment ~~of the~~ Court of Appeal for Ontario, pronounced in appeal from a judgment of the High Court of Justice in Ontario, that the ~~present~~ appeal is taken, and such appeal is from the judgment of the highest Court of appeal in Ontario in a case in which the High Court of Justice, being a superior Court, alone had original jurisdiction. That is a point which, as it appears to me, is concluded by the transfer of the case from the County Court for want of jurisdiction to entertain it. The appeal, therefore, in my opinion, lies, and the motion to quash should be dismissed with costs.

Sedgewick and King, JJ., concurred in the judgment of Mr. Justice Taschereau.

*Appeal quashed with costs.*

A. Weir, solicitor for the appellant.

Kittermaster & Gurd, solicitors for the respondents.

COURT OF APPEAL, ONTARIO.

TOWNSHIP OF MERSEA VS. TOWNSHIP OF ROCHESTER.

TOWNSHIP OF GOSFIELD NORTH VS. TOWNSHIP OF  
ROCHESTER.

TOWNSHIP OF GOSFIELD SOUTH VS. TOWNSHIP OF  
ROCHESTER.

In the matter of the Municipal Drainage Act and in appeal thereunder from the report, plans, profiles, specifications, estimates and assessments of William Newman, Esq., C.E., engineer for the township of Rochester, dated the 11th of February, 1898, in respect of the cleaning out, enlarging, extending and straightening of the River Ruscomb drain in the township of Rochester.

No. 1.

*Branch Drains—Separate Assessment—Assessment Under Improper Heading—Amendment of Engineer's Report.*

Where it is essential for the purpose of draining an area, a drainage-work may include such branch drains as may be necessary, and the main drain and branches may be repaired and enlarged in case of necessity under one joint scheme and joint assessment, a separate scheme and separate assessment for the main drain and for each branch not being necessary.

Under sub-section 3 of section 89 of the Municipal Drainage Act, R. S. O. ch. 226, the Drainage Referee has jurisdiction, with the consent of the engineer and upon evidence given, to amend the engineer's report by charging against the municipalities for "injuring liability," assessments erroneously charged against them by the engineer for "outlet liability."

Judgment of the Drainage Referee reversed.

The original work was constructed under a by-law of the county of Essex finally passed on the 9th of October, 1883, and extended by two branches, the Ruscomb River drain commencing at or near the town line between Gosfield North and Gosfield South, and the Silver Creek branch commencing near the 6th concession road in the township of Mersea, both branches extending northerly through the townships of Gosfield North and Mersea into the township of Rochester, and

joining in the latter township a short distance south of the Canada Southern Railway, thence continuing by one channel northward through the township of Rochester along the course of the River Ruscomb towards Lake St. Clair, and terminating at a point in the River Ruscomb, which is a natural watercourse from about the Canadian Southern Railway northward to Lake St. Clair. The upper township maintained the portions of the county drain within their respective limits at the expense of their own lands and roads. In 1893 the township of Rochester unsuccessfully sought to repair the portion of the drain within its limits, and to assess the upper townships towards the expense of the repairs, the Court of Appeal, upon an appeal by the upper townships, holding that according to the law as it then stood the attempted assessment was unauthorized. (See *Gosfield North vs. Rochester*, *Mersca vs. Rochester* (1) ).

The present scheme, instituted under section 75 of the Municipal Drainage Act, provides for the enlargement and improvement of that portion of the original drainage work lying within the township of Rochester, and for its extension further northward towards Lake St. Clair. The other facts fully appear in the different judgments.

July 5th, 1898. Thomas Hodgins, Q.C., Referee.

These appeals having come on to be heard together before me at the town of Leamington in the county of Essex on the 25th, 26th, and 27th days of May, 1898, and in the city of Windsor on the 28th day of May, 1898, in presence of counsel for all parties, and having heard the evidence adduced and what was alleged on behalf of all parties, and having reserved judgment until this day, I do report and adjudge :

1. The report of the engineer in this case states that the River Ruscomb drainage works are badly in need of repair; and recommends a scheme of drainage which will enable them to carry off the water of the lands originally intended to be drained, and "thus prevent damage to lands in the township

of Rochester." And further on the report states that the drains in the system of the adjoining townships have been enlarged, improved and extended from time to time whereby greater volumes of water are conducted into the River Ruscomb branch and Silver Creek branch, "thereby causing them to overflow and greatly damage the adjacent lands." These statements shew that some portion of the proposed drainage scheme is intended to relieve the Rochester lands of the water artificially caused by the adjacent township drains to flow upon and injure them; from which it is clear that for some portion of the proposed work there should be an assessment for "injuring liability," as defined in sub-section 3 of section 3 of the Drainage Act.

2. The report further recommends that "the outlet should be improved, and the drainage work be extended northerly along the river bed to a point about 3,000 feet north of the base line of the township of Rochester."

The term "outlet" used in the Act is defined to mean the safe discharge of water at a point (or place) where it will do no injury to lands or roads.

There is no description, and no particulars, of the locality of this "outlet" given in the report, but one of the engineers who was examined stated that he considered the term outlet in this scheme as properly applicable to the original bed of the Ruscomb River north of the Michigan Central Railway.

Assuming such to be the proper locality of the "outlet," it follows that the cost of the work necessary for the proposed improvement of the outlet should be assessed under the head of "outlet liability" against the lands and roads properly chargeable therewith, as prescribed in sub-section 4 of section 3 of the Act.

3. The report also recommends that the Silver Creek branch be straightened by a new cut, thereby avoiding two large and expensive bridges, and shortening the drain considerably.

Whether the report means that this improvement of the branch drain would necessitate an assessment for "benefit"



it is not, perhaps, material at present to consider. But as the engineer in his evidence has admitted that by the proposed drainage work certain lands will be enhanced in value, and as other engineers, some of whom gave evidence on behalf of the respondents, were of opinion that certain portions of the territory assessed by the engineer under the head of "outlet liability" should have been separately assessed for "benefit," I must find that the engineer's report is defective in not having so assessed the lands thus shewn to be benefited.

4. The 12th section of the Act makes it imperative on the engineer in his report to assess for "benefit," "outlet liability" and "injuring liability," and also directs that in his assessment schedule he is to insert the sum charged for each class of liability, opposite the lands and roads liable therefor respectively, and in separate columns.

The provisional by-law (No. 122) recites the reference by the council of the township of Rochester to the engineer to examine and report upon the condition, and means for the improvement of the drainage system, and the assessment to be made, and that he was to state, as nearly as he could, the proportion of benefit, outlet liability and injuring liability.

Neither the statutory direction, nor the expressed direction in the by-law, has been complied with in this report; but the engineer has assessed the lands and roads in the appellant townships with the cost of the different portions of the proposed improvement of these drainage works under the omnibus head of "outlet liability." In his evidence he said there was no practical difference in the result of this mode of assessment.

The statute does not authorize the expense or cost of the different portions of a proposed drainage work to be so assessed, nor does it authorize me to confirm the report or to amend the schedule so as to apportion the assessment over the lands and roads liable in the shape in which it ought to have been made and presented, simply because the engineer declares that the result will make no practical difference. If the statute is to be disregarded as to these specially prescribed

modes of assessment it must be by another tribunal. Therefore, in view of the imperative statutory direction, and of the evidence given by engineers, especially some of those called by the respondents, I am satisfied that it is my duty to allow the appeal.

5. There is a further ground on which this assessment cannot be sustained; between the Middle road and the Malden road the drainage system divides into two main branches—one the River Ruscomb branch and the other the Silver Creek branch—each having separate drainage areas. The Ruscomb branch is longer and more winding than the Silver Creek branch. From a statement put in by the engineers of Rochester and Mersea, I find that from 825 to 840 acres in the township of Mersea are drained by the Ruscomb branch and that from 6,550 to 6,565 acres in the same township are drained by the Silver Creek branch. The engineer of Rochester admits in his evidence that the land in the Silver Creek area will derive no benefit from the Ruscomb area, and vice versa. Notwithstanding this he has not separated the cost of each of these branch drains according to its appropriate drainage area, but has included the whole cost of both in one assessment, and has assessed the Ruscomb area with a portion of the cost of the Silver Creek improvement, and has also assessed the Silver Creek area with a portion of the costs of the Ruscomb improvement.

A similar mode of assessment came before me in the appeal of Gosfield South v. Gosfield North, and was held to be improper. I must hold the same in this case.

6. The appeals of Mersea, Gosfield South and Gosfield North must, therefore, be allowed with costs.

7. This report does not affect any assessments for this drainage work made by the engineer on the lands and roads in the other townships which have not appealed.

And I do order and direct that the respondents shall pay the sum of Sixteen Dollars in stamps as for a four days' trial, and shall affix the same to this my report, or that the appellants may pay the same and include it in their costs to be taxed against the respondents.

The township of Rochester appealed and the appeal was argued before Burton, C.J.O., MacLennan, Moss, and Lister, J.J.A., on the 22nd, 25th and 26th of May, 1899, Matthew Wilson, Q.C., and J. G. Kerr, for the appellants; A. H. Clarke and M. K. Cowan, for the respondents.

September 12th, 1899. The judgment of the Court, reported in 26 O. A. R. p. 474, was delivered by

Lister, J.A.:—

This is an appeal by the municipal corporation of the township of Rochester against the decision or judgment of the Drainage Referee, setting aside the report and assessment of its engineer in respect of the proposed work of cleaning out and enlarging that portion of the Ruscomb River drain and its east branch, the Silver Creek drain, within its limits.

On the 9th of April, 1898, Rochester provisionally passed a by-law to provide for enlarging and otherwise improving that portion of the Ruscomb River drain and its eastern branch, the Silver Creek drain, within its own limits, and it was therein recited "that complaint had been made that the Ruscomb River drain and its branch, the Silver Creek drain, were insufficient in capacity and totally inadequate to properly retain and carry off the water which was brought into them, and that the council had procured a surveyor to examine the same and report on the condition thereof, and to prepare plans, specifications and estimates of the drainage works, and an assessment to be made of the lands and roads to be benefited by such drainage works, and of all other lands and roads liable for contribution thereto, stating as nearly as he could the proportion of benefit, outlet liability, and injuring liability, which in his opinion would be derived or incurred in consequence of such drainage works by every road and lot or portion of lot, and that copies of such report, plans, specifications, estimates and assessments, had been served upon the head of the respective municipalities of Tilbury North, Tilbury West, Mersea, Gosfield North and Gosfield South, as required by section 61 of the Drainage Act, 1894."

And it then enacted that the report, etc., should be adopted and that the drainage work, as therein indicated and set forth, should be made and constructed in accordance therewith.

That portion of the report relating to the cost of the proposed work and the distribution of such cost on the several municipalities liable to contribute thereto, is as follows:—

“My estimate of the cost of the whole of the above works, as per plan and specifications, is the sum of \$30,080, as set forth in the detailed estimates hereto annexed. To this amount I have added ten per cent. for incidental expenses, making a total estimate of \$33,088.

“Of this amount I have assessed the township of Rochester with the sum of \$10,204.02 on lands, the sum of \$941.50 on roads, and the sum of \$1,641.22 for bridges, thus making the total assessment of Rochester, \$12,786.74, as set forth in the schedule of assessment hereto annexed.

“I have assessed the township of Tilbury North with the sum of \$399.80 on lands, and the sum of \$81 on roads, thus making the total assessment of Tilbury North, \$480.80, as set forth in the schedule of assessment hereto annexed.

“I have assessed the township of Tilbury West with the sum of \$2,552.55 on lands, and the sum of \$387 on roads, thus making the total assessment of Tilbury West \$2,939.55, as set forth in the schedule of assessment hereto annexed.

“I have assessed the township of Mersea with the sum of \$7,388.91 on lands, and the sum of \$463.50 on roads, thus making the total assessment of Mersea \$7,852.41, as set forth in the schedule of assessment hereto annexed.

“I have assessed the township of Gosfield North with the sum of \$7,868 on lands, and the sum of \$572 on roads, thus making the total assessment of Gosfield North \$8,440, as set forth in the schedule of assessment hereto annexed.

“I have assessed the township of Gosfield South with the sum of \$538.50 on lands, and the sum of \$30 on roads, thus making the total assessment of Gosfield South \$568.50, as set forth in the schedule of assessment hereto annexed.”

Accompanying the report were the schedules shewing the lands and roads assessed for the several municipalities for the

expense of the proposed work, and which were headed as follows :—

| Concession | Lot or Part<br>of Lot | Area<br>Acres | Owner's<br>Name | Value of<br>Benefit | Value of<br>Outlet<br>Liability | Total Value<br>of Improve-<br>ment |
|------------|-----------------------|---------------|-----------------|---------------------|---------------------------------|------------------------------------|
|------------|-----------------------|---------------|-----------------|---------------------|---------------------------------|------------------------------------|

All the lands and roads assessed in the upper townships (being all the townships assessed except Rochester) were assessed under the column headed "outlet liability."

The townships of Mersea, Gosfield North and Gosfield South, appealed to the Referee against the report, plans, specifications, etc., on the following grounds:—

1. "The scheme of the proposed drainage works should be abandoned because of the great disproportion between the cost of the work, namely, \$33,088, and the benefit to be derived by lands and roads from the said work.

2. "That no sufficient petition was presented to the municipal council of the corporation of the township of Rochester asking for the said work, which is in reality an original construction, the old drain which it pretends to improve being so much smaller that the present scheme is practically new work.

3. "That the lands and roads assessed for the proposed work are situate miles distant from the proposed work, and have without such work ample drainage and ample outlet for all waters falling upon and draining over such lands and roads, and the proposed work will not afford any improved outlet for the said lands and roads, and their assessment under the head of outlet liability is illegal and unwarranted.

4. "That the River Ruscomb is a natural watercourse with well defined banks extending both into the township of Gosfield North in its main branch, and into the township of Mersea in the Silver Creek branch, and all the water which is conducted into the said natural watercourse in the said upper townships naturally tends thereto, and the said lands and roads have a legal right to use such natural watercourse without being assessed in respect of any work for its improvement in the township of Rochester.

5. "That the necessary steps provided by the Municipal Drainage Act, such as calling a meeting of ratepayers to consider the report of the engineer, the passing of a provisional by-law, and other formalities have not been complied with.

6. "That the lands proposed to be assessed for the said drainage works are not sufficiently described in the schedule of assessments to enable or justify a tax being levied and enforced against such imperfectly described lands.

7. "That the engineer's assessment is erroneous in including the sum of \$1,000 to pay all unavoidable damages to owners of lands, there being no contemplated damage to any particular lots shewn to warrant the estimate for such damage, and the said estimates are also erroneous in adding, first, ten per cent. to said \$1,000 for damages, and afterwards ten per cent. to the total cost of the work, including such damages and percentage.

8. "That the assessment against the lands and roads in the appealing townships is unjust and excessive.

9. "And generally upon such further and other grounds as upon hearing the evidence will appear from the testimony of witnesses, and from the proceedings had and taken in reference to the proposed work."

The townships of Tilbury North and West did not appeal.

The Referee held and determined that the assessment was void, and set aside the report and assessment in so far as the same affected the appealing townships.

The drains were constructed in the year 1883 by the corporation of the county of Essex under the authority of a by-law passed in pursuance of section 598 of the Consolidated Municipal Act, 1883, as a single scheme with a single assessment.

They were designed to relieve the lands of Rochester from water brought down by Mersea and Gosfield, and were respectively constructed in the course of what was locally known as the Ruscomb River and Silver Creek.

Silver Creek drain was constructed as a branch of the Ruscomb River drain.

The Ruscomb River within Rochester, to a point north of the railway, appears to have been a large running swale.

Silver Creek was also a running swale joining the Ruscomb River, at a point south of the railway.

After the construction of these drains by the county the upper townships constructed new, and enlarged and extended old, drains which had the effect of conducting water from the upper townships into the Ruscomb River and Silver Creek drains in greatly increased volume, and which the last named drains were insufficient to carry off, with the result that they overflowed and flooded and damaged the lands of Rochester. The proposed work was intended to relieve Rochester from not only its own water, but from the water so brought down by the other townships by so improving the drains as to make them sufficient to carry off such waters.

The learned Referee bases his judgment upon two grounds: (1) That the assessment of the engineer was erroneous in this, that the lands of the respondent townships ought to have been assessed for injuring liability and not for outlet, and (2) that the drainage system divides into two main branches, each having a separate drainage area, and that the appropriate drainage area should be assessed for the cost of its branch, instead of assessing the whole cost upon both areas as if they constituted but one area. And he determined that the assessment was, therefore, invalid, and he also determined that the statute does not confer upon him power or jurisdiction to correct or amend the report so as to change the assessment from outlet to injuring liability.

I agree that the lands of the respondent townships ought to have been assessed for injuring and not outlet liability. There was evidence tending to shew that whether assessed in one way or the other the quantum of assessment on the various parcels of land would have been the same.

The first question for consideration is, does the statute confer on the Referee jurisdiction to correct and amend the report in respect of the errors above mentioned ?

Sub-section 3 of section 89 of the Municipal Drainage Act, R. S. O. ch. 226, provides that "The Referee shall have

power, . . . with the engineer's consent, and upon evidence given, to amend the report in such manner as may be deemed just, and upon such terms as may be deemed proper for the protection of all parties interested, and, if necessary by reason of such amendments, to change the gross amount of any assessment made against any municipality, but in no case shall he assume the duties conferred by this Act upon the Court of Revision or County Judge."

The language of this section is, as it appears to me, sufficiently comprehensive to confer on the Referee, with the consent of the engineer and upon evidence given, jurisdiction to correct and amend the report (of which the assessment schedule is a part) in respect of an error or defect such as he found to exist here.

If the limited construction placed on the words of this sub-section by the Referee were to prevail the object of the Act would be defeated; a single parcel of land assessed under what the Referee might determine to be the wrong heading, would render the whole assessment nugatory. Such could not have been the intention of the Legislature, and is not, in my judgment, the true interpretation of the section.

In considering the second ground, it must be borne in mind that the purpose contemplated by the county in constructing the drains was the drainage of an area; the relieving of lands in Rochester from water, a portion of which was caused to flow from the upper townships into Rochester to the injury of its lands, and that in the opinion of the engineer, and agreed to by the council, it was essential in order to effect this purpose, that, not only the main or Ruscomb River drain should be constructed, but that the eastern branch, or Silver Creek drain, should also be constructed, and that both were in fact constructed under one by-law as a single scheme or undertaking with a single assessment upon the lands liable to contribute to the expense thereof.

There can be no doubt that a drainage work may include such branch drains as may be necessary to render the drainage of the area effective, and that the main and branch drains may



be regarded as a single scheme or undertaking, for the expense of which the lands in any way liable to contribute may be assessed as for a single scheme. There is no provision of the statute which suggests, in such a scheme, the necessity of a separate assessment. It may be that an assessment for the cost of a work, such as the drainage work in question, is unequal and unjust; lands may have been assessed too high while other lands have been assessed too low; lands may have been assessed which ought not to have been assessed, and other lands which ought to have been assessed, may have been omitted, but these are all matters proper to be adjusted and determined by the Court of Revision of each municipality, and not by the Referee, who under the Act is authorized to deal only with the gross amount of the assessment against each municipality assessed.

The contention on the part of the respondents that the proposed work is practically a new work and cannot be undertaken by the appellants without the petition of the ratepayers required by section 3 of the Act, cannot be sustained.

The proposed work is one which, in my opinion, may be undertaken under section 75, but whether it is regarded as a new work or the improvement of an old drain is immaterial; in either view, in the circumstances of this case, it may be initiated and proceeded with, without petition; if a new work under sub-section 3 of section 3 of the Act, and if it is the improvement of an old drain, under section 75.

The evidence establishing that by means of drains constructed by the respondent townships water has been caused to flow from the lands and roads of their townships, upon and to injure the lands and roads of the appellant township, the lands and roads of the respondent townships are, under sub-section 3 of section 3, liable, subject to the formalities and powers therein contained, except the petition, to be assessed and charged as for "injuring liability" for the construction and maintenance of drainage works required for relieving the injured lands or roads from the water so caused to flow, and if the work is the improvement of an old drain it falls

within section 75 of the Act, which provides that "Whenever, for the better maintenance of any drainage work constructed under the provisions of this Act, or any Act respecting drainage by local assessment, or to prevent damage to any lands or roads, it is deemed expedient to change the course of such drainage work, or make a new outlet for the whole or any part of the work, or otherwise improve, extend, or alter the work . . . the council of the municipality, or of any of the municipalities whose duty it is to maintain the said drainage work, may, without the petition required by section 3 of this Act, but on the report of an engineer or surveyor appointed by them to examine and report on the same, undertake and complete the change of course, new outlet, improvement, extension, alteration . . . specified in the report, and the engineer or surveyor shall for such change of course, new outlet, improvement, extension, alteration . . . have all the powers to assess and charge lands and roads in any way liable to assessment under this Act for the expense thereof in the same manner, and to the same extent, by the same proceedings and subject to the same rights of appeal as are provided with regard to any drainage work constructed under the provisions of this Act."

What I have said as to the amendment of the report in respect to lands assessed under the wrong head, applies to lands assessed but improperly or insufficiently described.

The Referee has made no finding as to whether the proposed scheme ought to be abandoned or modified.

Other objections to the scheme made by the respondents are not, as it appears to me, fatal to this appeal, and, therefore, I do not think it necessary now to discuss them.

This appeal must be allowed with costs, and the case must go back to the Referee for further consideration; the costs below and subsequent costs to be in his discretion.

*Appeal allowed.*

NOTE.—For the report of the Referee on the reference back, and the judgment of the Court of Appeal on appeal therefrom, see next page.

## COURT OF APPEAL, ONTARIO.

TOWNSHIP OF MERSEA VS. TOWNSHIP OF ROCHESTER.

TOWNSHIP OF GOSFIELD NORTH VS. TOWNSHIP OF  
ROCHESTER.TOWNSHIP OF GOSFIELD SOUTH VS. TOWNSHIP OF  
ROCHESTER.

(No. 2.)

*Natural Watercourse — Improvement — Section 75 Drainage Act —  
Repair—Injuring Liability—Assessment.*

Section 75 of the Drainage Act, R. S. O. 1897 ch. 226, applies only to drains artificially constructed, and does not apply to the repair or improvement of a natural watercourse. Sutherland-Innes Co. vs. Romney (1), considered and followed.

The initiating municipality having failed to keep in repair the portion of the drain within its limits constructed under a county by-law, while the minor municipalities had at their own expense repaired the portions within their respective limits:—

Held: That the cost of putting those parts of the original drainage work within the initiating municipality in the same condition in which they were when completed by the county council, should be assessed against lands and roads in that township alone.

Proper mode of assessment upon lands from which water artificially caused to flow, discussed.

Per Drainage Referee:—In assessing for injuring liability the injured lands should be defined or be capable of being defined in order to ascertain the assessment upon the lands responsible for the injury.

The particulars of the drainage work in question are given in the report of the previous appeal, contained in this volume and in 26 O. A. R. 474.

Upon the reference back directed by the Court of Appeal further evidence was taken, and on the 8th of November, 1900, the following report was made by the then Referee.

Mr. J. B. Rankin, Q.C.:—

Present—A. H. Clarke, Esq., and M. K. Cowan, Esq.,  
for appellants; and M. Wilson, Esq., Q.C., and J. G.  
Kerr, Esq., for respondents.

During the years 1883 and 1884 the municipal council of the county of Essex, under the authority of section 598 of "The Consolidated Municipal Act, 1883," constructed what is called the River Ruscomb drain and the Silver Creek branch as a single drainage scheme, and upon a single assessment of the lands made liable for the cost of the work.

In the months of October and November, 1897, the council of the respondents received petitions and notices from many persons interested asking for and demanding the repair and improvement of this drainage work, and, after considering the grievances, a resolution was passed appointing William Newman to examine and report. The report of the engineer was duly served upon all the municipalities affected, viz.: Tilbury North, Tilbury West, Mersea, Gosfield North and Gosfield South. The council of Tilbury North did not appeal from the report, nor did the council of Tilbury West. The three remaining townships appealed from the said report, and, although separate notices of appeal were given, the grounds of appeal are alike in all three cases, and appear in detail in the judgment of the Court of Appeal herein, 26 A. R. page 474. The appellants claim by their respective notices that the said report, plans, specifications, assessments, and estimates of the engineer should be set aside and that the provisional by-law (if any) for the proposed drainage works should be quashed for several reasons. There is no need of setting forth the reasons, and I shall consider those only to which the evidence taken before my predecessor, and more especially that taken before me, was definitely directed. The locality in question is sufficiently outlined in the judgment of the Court of Appeal, by whose order the case was referred back for further consideration.

The inspection of the lands in the appealing townships took place on the 3rd and 4th of July and additional evidence was given by both parties at Sandwich on the 4th and 5th of July. After hearing argument of counsel I reserved my decision. On October 12th additional evidence was heard and the decision was again reserved.

The fall on the surface of the ground from the 6th concession road in the township of Mersea to the townline between the townships of Mersea and Rochester along the course of Silver Creek, a distance of about 6 miles, is  $45\frac{1}{2}$  feet, and the fall between the same concession road and the same townline following the course of the Ruscomb is  $39\frac{1}{2}$  feet. The evidence of Mr. Newman, at page 87, establishes the above falls, and then goes on:

Q.—So that the fall in Mersea is about nine feet to the mile on an average? A.—Yes, that is in a straight course, of course.

Q.—Of course the creek is winding? A.—Yes, sir.

Q.—And in Gosfield about eight feet to the mile? A.—That is taking a straight course.

Q.—But the creek is winding? A.—Yes, sir.

Q.—Take the fall from the sixth to the tenth concession line of road is that ten feet to the mile, and then does it drop to four and five? A.—It drops off perceptibly at the 8th concession.

Q.—From the 8th to the 9th? A.—In the southerly part of the 8th.

Q.—It has a heavy fall? A.—Yes, sir.

Q.—Through to the 10th? A.—No, sir; probably half way.

Q.—Now, will you give me the fall from the 6th to the 7th concession road on Silver Creek? A.—I have not measured it, in a direct course it would be three-quarters of a mile, but the ditch is crooked.

Q.—And what is the fall across the 7th concession? A.—Seven feet 9 inches.

Q.—In the 8th concession? A.—Eight feet ten inches.

Q.—In the 9th concession? A.—Eight feet five inches.

Q.—In the 10th concession? A.—Seven feet four inches.

Q.—Then the 11th concession? A.—Four feet one inch.

This extract from the evidence taken before me agrees with what appeared upon a personal inspection of the locality accompanied with the solicitors of the parties and one engineer on each side. The 6th concession road in both the town-

ships of Mersea and Gosfield North is only a very short distance north of the crown of what is known as "The Ridge," and from that road north to the 10th and 11th concession road the surface fall through the four concessions, beginning at the south, is seven and three-quarters feet, eight and five-sixths feet, eight and five-twelfths feet, and seven and one-third feet, respectively. This brings us to within one concession of the townline, and through this concession the fall is only four and one-twelfth feet, or one inch more than one-half the average surface fall through the four concessions to the south. It also shows that the Silver Creek is a chain of swales, as is also the Ruscomb, sometimes with banks and sometimes without, according to the nature of the soil through which the water passes.

At page 102 Mr. McGeorge's evidence is as follows:—

Q.—Now take the lands north of the 11th concession and the lands in the 11th concession of Mersea and Gosfield, and from that north you find them very low and flat? A.—Yes; in the 11th concession you mean?

Q.—Yes, north all through there is a very low flat section? A.—You mean taking Rochester, too?

Q.—Yes? A.—That is right; they are low.

Q.—These are very low lands? A.—It is a low swampy section.

Q.—And the water naturally from the higher lands in Mersea and Gosfield flows down on to that section? A.—When the lands were in a state of nature I suppose they did. I was there in 1857 and 1858.

Q.—Did you have a boat? A.—I went through it up to my knees in water, and another time I went through it that you could not have got a drink.

Q.—Then, Mr. McGeorge, take the lands in the 11th concession of Mersea and north through Rochester; they would not be able to drain at all unless these works were constructed? A.—Unless works were constructed.

Q.—So the works are necessary as an outlet to the lands north? A.—Yes, sir; necessary for draining the lands.

Q.—The work will not in any way drain the lands to the south? A.—Why, I cannot see it.

Q.—I thought all the engineers had agreed that they did not need that at all; you are not assessing them for outlet?

A.—For injuring liability, when you say lands to the south, south of where do you mean?

Q.—I mean to say the south half of the 10th concession lots, and from that up south? A.—I suppose they would discharge their waters on the first townline.

Q.—Eight and nine feet to the mile? A.—Yes, sir.

Q.—Therefore these works are not at all necessary for the drainage of their land? A.—Well now, let me understand, I think it is necessary.

Q.—I will take your answer as you give it, that they can drain without it? A.—They do that way.

Q.—And if there was not enough of work done up above the 8th or 9th and 10th? A.—I suppose not, I think they could get their water away without this.

Q.—It would go down to the swamp? A.—Yes, sir.

Again the same witness, at page 117, gives evidence as follows:—

Q.—I am not asking you that, I am asking you whether these waters would flow down there in a state of nature without artificial draining? A.—Well, some of them would.

Q.—Would all of them? A.—No, certainly not.

At page 106 the questions are asked Mr. McDonell:

Q.—Doesn't it follow that the land lying to the south the water flows off that naturally to the north? A.—Yes, sir.

Q.—Then a lot to the north has to take care of its own waters and the water that would naturally flow on it from the south? A.—Yes, sir.

Q.—So that it has a greater volume of the waters to care for than the land to the south? A.—Yes, the burden is greater from the natural flow.

Q.—Then we have got down to the difference between his and the basis of your assessment is that although these lands had a fall of eight, nine, or ten feet to the concession and go down to Rochester where the fall is only three or four

feet, that although these lands drain their waters, their water came down naturally, that so far as their outlet liability is concerned you draw no distinction between those and the higher lands? A.—I don't make any distinction.

Q.—You did not take into consideration the fall of the land to the south? A.—No.

I have made these extracts from the evidence for the purpose of showing the natural trend of the land from the 6th concession of Mersea and Gosfield North to the townline, or to the points where the proposed work begins or heads, and the relative fall along the course of the two branches to their junction and thence north to the outlet. Turning to the profile of the proposed work, it will be found that the above evidence is corroborated. The drainage work is about thirteen miles long, and is all in the township of Rochester. If we divide this distance into sections of six and a half miles each it will be found that the surface fall in the section immediately north of the townline is about four feet to the mile along the Ruscomb, and somewhat greater along the Silver Creek course. The fall along the lower section of six and one-half miles is less than two feet to the mile on the surface.

Now, the inclination in the bottom of the proposed work in the upper of these two sections by way of the Ruscomb is 4.75 feet per mile for part of the distance, and then for the remainder of this same section 2.83 feet per mile. In the lower section the said inclination is 2.37 for part of the distance, then 4.22 feet per mile for another part, and for the last two miles there is no inclination at all. The Silver Creek branch in its upper section has an inclination of 5.54 feet per mile, and lower down 4.22 feet per mile, until the junction with the Ruscomb is reached (see profile).

The evidence and inspection establish that the fall from the 6th concession in both townships of Mersea and Gosfield North to the townline between Rochester and Mersea is as nearly as possible double the fall though the next section of the same distance, and nearly four times as great as through the northerly section.



I further find established by the evidence and inspection that in the townships of Mersea and Gosfield North there is an elevation of sandy land running obliquely across the townships, and through this rise of land the course of the Ruscomb and Silver Creek, as streams, is clearly and distinctly marked with fairly high banks on both sides, while south of this elevation and also north of it the course is perceptible in some places and not at all in others.

After the work of 1883 and 1884 was completed it was the duty of each municipality to keep the drainage work within its own limits in repair.

The townships of Mersea and Gosfield North repaired within their limits and the township of Rochester did not repair, although it was its statutory duty then to do so.

The inevitable result of the repair of the highest section of the drainage work about six and a half miles in length, with the fall above mentioned, discharging into the heads of the unrepaired sections with about one-half the fall, must have been to cause the drainage work to overflow in the township of Rochester. The drainage scheme under consideration now proposes to repair, improve, straighten and extend the drainage work within the limits of Rochester only.

It was under these conditions that the engineer was sent on by the township of Rochester, and he reports that the county work of 1883 and 1884 was never sufficient to properly drain the lands intended to be drained, that the townships whose lands are assessed for the River Ruscomb drainage works have constructed a regular system of drains in their respective townships for miles, which conduct their waters into the River Ruscomb drainage work, and thence into Lake St. Clair, and the drains in their systems have been enlarged, improved and extended from time to time, conducting greater volumes of water into the River Ruscomb and Silver Creek branch, and thereby causing them to overflow and greatly damage the adjacent lands; that in order to better maintain this drain and its branches, and to prevent damage to lands and roads affected thereby, he recommends that the drainage works be cleared out, enlarged and

straightened, commencing in the River Ruscomb proper at the Gosfield North and Rochester townline, and in the Silver Creek branch at the Mersea and Rochester townline, following the course of the old drain northerly, except as hereafter altered; and that the outlet be improved, and that the drainage work be extended northerly along the river bed to a point about 3,000 feet north of the base line of Rochester, thence meeting the still waters of Lake St. Clair.

This proposed work is estimated to cost \$38,088, and the assessments on the lands and roads of the various municipalities interested are as follows:—

**Rochester:**

|                                      |           |             |
|--------------------------------------|-----------|-------------|
| Benefit....                          | \$ 787 00 |             |
| Outlet, now injuring liability ..... | 10,358 52 |             |
| Bridges .....                        | 1,641 22  |             |
|                                      | <hr/>     | \$12,786 74 |

**Tilbury North:**

|            |          |        |
|------------|----------|--------|
| Benefit .. |          |        |
| Outlet ..  | \$480 00 |        |
|            | <hr/>    | 480 00 |

**Tilbury West:**

|              |             |          |
|--------------|-------------|----------|
| Benefit .... |             |          |
| Outlet ..    | \$ 2,939 55 |          |
|              | <hr/>       | 2,939 55 |

**Mersea:**

|                                      |             |          |
|--------------------------------------|-------------|----------|
| Benefit ....                         |             |          |
| Outlet, now injuring liability ..... | \$ 7,852 41 |          |
|                                      | <hr/>       | 7,852 41 |

**Gosfield North:**

|                                      |             |             |
|--------------------------------------|-------------|-------------|
| Benefit ....                         |             |             |
| Outlet, now injuring liability ..... | \$ 8,460 00 | 8,460 00    |
|                                      | <hr/>       | \$33,088 00 |

Engineers McDonell and McGeorge vary the above assessments, reducing Rochester's to \$12,095.86, Tilbury North's to \$31.07, Tilbury West's to \$784.68, and increasing the appellants' as follows: Mersea, \$9,828.79; Gosfield North, \$9,635.13, and Gosfield South, \$712.17. The argument based

on such assessments is that Mersea lands and roads should have been assessed about \$2,000, or, to be exact, the difference between \$9,828.79, according to engineers McDonell and McGeorge, and \$7,852.41, according to engineer Newman, or \$1,976.38, and therefore this appellant has no cause of complaint. If this be logical, then the same reasoning can be applied in a somewhat less degree to the other two appellants. In my judgment this argument is wholly untenable and shews, if it shews anything, that the assessments are very much unlike and contradict, instead of support, each other.

In describing the method adopted in assessing for such work Engineer Newman says:

Mr. Cowan:—

Q.—Then you must have arrived at the size that was necessary for Silver Creek above the junction; how did you arrive at that? A.—From experience with other drains.

Q.—Is that all? A.—And calculations.

Referee:—

Q.—You say you made the calculation from your experience with other drains? A.—Yes, sir.

Q.—Did you make any calculations based on the volume of water in your drain? A.—I took the area and compared it with the area drained in other drains under similar circumstances.

Q.—You say you took the area draining into this drain and made calculations based on other drains? A.—The drainage area and amount of land draining into it.

Q.—What I asked you was whether you took into account the volume of water just above the junction of Silver Creek? A.—Yes, in that way.

Q.—What is the meaning of “that way”? A.—By comparing it with the volume and size of other drains which I from experience know would carry the water.

Q.—Well, with what other drains have you compared it? A.—I have made dozens, your Honor, in a very similar country to that.

Q.—Well, have you the details to show the result? A.—I haven't them with me, but I can produce some of them.

By Mr. Cowan:—

Q.—But you did not make any calculations on this drain? A.—Not any more than comparing it with these drains.

Q.—Then you made no mathematical calculation irrespective of other drains? A.—No, sir.

Q.—I say in that calculation, or guess, or whatever you call it, in your estimate, did you take into consideration the size of the drain that was necessary to carry off all the waters which by any means found their way into it? A.—Yes, sir.

Q.—And assessed for outlet liability on that basis? A.—Yes, sir.

Upon this evidence the engineer assessed for outlet liability all the lands in the appellant townships for conveying away thirteen miles to Lake St. Clair, the waters naturally flowing on the surface and in the streams, and also the water artificially caused to flow as well. In another place he says that if the water from Mersea and the Gosfields were shut off, it would only cost Rochester \$4,626.90 to provide for the water from its own lands, and \$7,632.60 would take care of the natural flow from the upper townships, and the argument based on this is that it proves the assessment put on the appellants is about right. If the waters from the townships of Mersea, Gosfield North and Gosfield South were shut off, then Rochester lands would have the natural channels of the Ruscomb River and Silver Creek to themselves, and they would also have the improvement in those channels under the county work of 1883 and 1884, which the upper townships helped to pay for, and this improvement is omitted altogether from the reckoning. Again, the drainage work within the township of Rochester was out of repair owing to the failure of that township to comply with the statute and county by-law.

At page 61 of the new evidence Engineer McDonell gives evidence on the point now being considered.

Q.—Take the year round, what percentage as compared with a clay farm will those sandy lands throw off, what percentage of water into the drain? A.—I can't tell you.

Q.—Can you give me any idea? A.—I can not.

Q.—Will it throw fifty per cent.? A.—Yes, sir.

Q.—The year round? A.—Yes.

Q.—Will it throw more? A.—It will throw more.

Q.—Can you give me any idea how much more? A.—No, I can not.

Q.—And you made no allowance, you told me, in any way for that? A.—I made no allowance for it because they are not all sandy land.

Q.—Then have you made any allowance for their natural drainage? A.—Which natural drainage?

Q.—Any natural drainage from them? A.—No.

Q.—You have made no allowance for any natural drainage at all? A.—No, sir.

Referee:—

Q.—Did you make any allowance for the water that would naturally flow on the surface of the ground from these higher lands? A.—No, I did not from the fact that the water will flow from the township of Gosfield North as freely as they would from the southerly township, but I am dealing with them as if they were one block of land.

Q.—Then you made no allowance between that which naturally went off and that which was caused to artificially go off? A.—No, sir; I made no distinction whatever.

Q.—And then in making no distinction you have made no calculation at all? A.—No; I made no calculation.

Q.—Then I see in Mersea township up through that sandy district you have assessed the land at \$1.25 and three-tenths per acre? A.—Yes, sir.

Q.—And that is exactly the same as you have assessed the last concession in Mersea and the first tier in Rochester? A.—Just the same. They are similarly situated.

Q.—No difference? A.—No difference.

I am of opinion that this principle of assessment can not be supported. The upper townships are assessed for the purpose of removing an injury which by artificial means they have caused to lands in the lower. This is clearly expressed in the judgment of the Court of Appeal in this case, and also

in *Re Caradoc and Ekfrid*(1). At page 580 it is said, "assessment for relief from injuring liability seems to be the same thing as 'injuring liability.' In sub-section 3 of section 3, the assessment of lands from which water is "by any means caused to flow upon and injure" other lands; the assessment being for the cost of the drainage work necessary "for relieving the injured lands from such water." The difficulty arises in giving practical effect to this provision of the Act, and even with the assistance of sub-section 5 of section 3, mathematical certainty is an impossibility; and approximate result can only be attained. The injured lands should be defined, or capable of being defined, as was decided in *Orford vs. Howard* (2), at page 499, otherwise the very first step cannot be taken either to fix the cost of its removal or ascertain the assessment upon the lands responsible for such injury. Here there is no attempt made to show the lands injured excepting that the Ruscomb River and Silver Creek overflow. The original assessment was for outlet liability, and this has been changed to injuring liability, or rather it has been decided that the Referee has that power under the Act. I am considering the question as though the assessment upon the lands in the appellant townships was for injuring liability, and not for outlet liability.

There is according to the report no benefit conferred upon any lands or roads in the appellant townships, nor is there any benefit to be derived from the scheme except in the bottom lands adjoining the work, and then only to the extent of \$757 out of a total of \$33,088, and the appellants' lands are assessed as far as the ridge to the south, or a distance of over six miles above where the proposed work begins. Nor is this all, important though it be, for the extracts from the evidence clearly show that the provisions of sub-section 5 of section 3 were wholly disregarded. It is argued further that the inclination of the land and the nature of the soil were factors which should have been considered in connection with the working out of said sub-section 5. This argument in my opinion is entitled to prevail. Referring again to *Re Caradoc vs.*

Ekfrid(1), at page 581, Mr. Justice Osler says: "What I regard as objectionable in the principle which the engineer seems to have adopted is this: that, to use his own language, he has taxed the lands because they contribute water to the area drained, charging lands within that area with outlet expenses, no matter how remote they are, and although the new work or perhaps the drain itself is not necessary for the cultivation or drainage of the land."

For the reasons given, I am of opinion that the assessment on the lands in the townships appealing are excessive and unjust, and as there is no evidence upon which I can in my judgment re-adjust them so as to do justice to the appellants and respondents, notwithstanding the consent of the engineer of the initiating municipality, I think the assessments cannot be sustained.

In the case of Broughton vs. Grey and Elma(3), at page 503, Mr. Justice Gwynne says: "There does not appear in any of the Acts a scintilla of intent on the part of the legislature to legislate in such a manner as to enable one municipality by a by-law passed by its council to impose upon lands situate in another municipality an obligation to contribute to the cost of the construction and maintenance of a drain constructed within the limits of the former municipality for the drainage of lands situate therein, which work in point of fact contributed no benefit whatever upon the lands in the other municipality. The whole scheme of the legislation upon the subject is that they who derive benefit from such a work, and they only, shall bear the burden of its construction and maintenance. *Qui sentit commodum sentire debet et onus* is the principle upon which all legislation on the subject is expressly provided.

In the recent case of Sutherland et al. vs. Romney in the Supreme Court (not yet reported), a manuscript of which judgment I have had the perusal of, the above maxim is applied, notwithstanding the change in the law by the Act of 1894. Applying the principle of assessment therein

enunciated to the case under consideration, the engineer of the respondent township had no power to assess for injuring liability the lands in the appellant townships for any part of the proposed work farther north than the junction of the Silver Creek and Ruscomb River.

It was conceded during the argument of this case in October, as already mentioned, that if *Sutherland vs. Romney* was binding upon me, the assessments of appellants could not stand. I have no doubt upon this point. While the Supreme Court cannot review my report or decision, there is nothing to prevent any ratepayer assessed in any township from attacking the whole scheme by action, and in that way reach the Supreme Court, where *Sutherland vs. Romney* would be followed and the whole scheme declared to be beyond the competence of the respondent to launch either under section 3 or 75, or any other section in The Municipal Drainage Act.

I therefore report, order and direct that the appeals of Mersea, Gosfield North and Gosfield South be allowed and that the report and assessment of William Newman, engineer for the respondent, be set aside, and that the work proposed and provided for by the said report and assessment should be abandoned.

I report, order and direct that the costs of the townships of Mersea, Gosfield North and Gosfield South of these appeals and reference before my predecessor and before me be paid by the Township of Rochester to the Townships of Mersea, Gosfield North and Gosfield South, and that such costs be taxed by the clerk of the County Court of the County of Essex at the city of Windsor.

I further order and direct that the trial before me be considered as a trial of three days, and that stamps to the amount of \$12 be affixed to this report and paid for by the Township of Rochester, and if affixed by any of the appellant townships, the amount shall be included in the costs to be taxed to such township.

I further order and direct that each of the townships shall bear its own costs of inspection.



The Township of Rochester appealed, and the appeal was argued before Armour, C.J.O., Osler, Maclellan, Moss, and Lister, J.J.A., on the 20th and 21st of March, 1901.

Matthew Wilson, K.C., for the appellants.

A. H. Clarke, for the respondents.

September 21, 1901. Armour, C.J.O.:—

The principles which should have guided the engineer in making his report are simple enough, although the practical application of them is difficult enough.

Having estimated the total cost of the proposed drainage work, he should have estimated what it would have cost to put those parts of the Ruscomb and Silver Creek branch drains within the township of Rochester in the same condition in which they were when completed by the county council, and should have deducted this sum from the total cost as estimated, and should have charged it against the lands and roads in the township of Rochester which were assessed for the construction thereof by the county council, for that township was bound to keep those parts in repair and failed to do so.

He should then have ascertained the volume of water which, subsequently to the completion of those drains to their full extent by the county council, was artificially caused to flow from the lands and roads in each township, including Rochester, into those drains after their completion, and he should have charged the lands and roads in each township from which such volume of water was artificially caused to flow into those drains with the same proportion of the total cost (that is, the total cost less that portion thereof chargeable against lands and roads in the township of Rochester as above mentioned) which such volume of water bore to the whole volume of water artificially caused to flow from lands and roads in all the townships, including the township of Rochester, into those drains.

The learned Referee has held, following the judgment of Mr. Justice Gwynne in the Supreme Court in *Sutherland-*

Innes Co. vs. Romney (4) that the engineer had no power to assess for injuring liability any lands or roads for any part of the proposed work north of the junction of Silver Creek and Ruscomb River.

The construction placed by Mr. Justice Gwynne in that case upon the words "drainage work" in sec. 75 of 57 Vict. ch. 56 (O.), now sec. 75 of the Municipal Drainage Act, was in my opinion erroneous, and must have been arrived at by him by his overlooking sec. 3 of that Act, now sec. 3 of the Municipal Drainage Act, to which he has not adverted.

That section provides that upon the petition of the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners) as shewn by the last revised assessment roll to be the owners of the lands to be benefited in any described area within any township, incorporated village, town, or city, to the municipal council thereof for the drainage of the area described in the petition by means of drainage work, that is to say, the construction of a drain or drains, the deepening, straightening, widening, clearing of obstructions, or otherwise improving any stream, creek, or watercourse, the lowering the waters of any lake or pond, or by any or all of the said means as may be set forth in the petition to the council, etc.

And thus in effect defines "drainage work" to mean the construction of a drain or drains, the deepening, straightening, widening, clearing of obstructions, or otherwise improving any stream, creek, or watercourse, and the lowering the waters of any lake or pond, and throughout the Act "drainage work" is used to signify each and every of these subjects, and as applicable to each and every of them.

I cannot, therefore, agree with the Referee in holding that the engineer had no power to assess for injuring liability any lands or roads for any part of the proposed work north of the junction of Silver Creek and Ruscomb River.

The engineer was not, however, guided in making his report by the principles above laid down, and his report could

not therefore have been upheld by the Referee, and there was no sufficient evidence given on the appeal to the Referee to enable him, with the consent of the engineer, to amend the report so as to make it conform to these principles.

The Referee, in my opinion, went too far in directing that the proposed drainage work should be abandoned, and the township of Rochester should be allowed to initiate and carry on a fresh proceeding for the same purpose as the proposed drainage work.

And with these variations from the report of the Referee, this appeal will be dismissed with costs.

Osler, J.A.:—

I think the appeal should be dismissed and the report or judgment of the Referee sustained. I do not think it is necessary to make any variation in his order. In my opinion he was right in holding that the assessment complained of could not stand, in the face of the recent decision of the Supreme Court in *Sutherland-Innes Co. vs. Romney*(4), which he was bound by and ought to follow, as we are also bound to do. As I took no part in the judgment of this Court in that case, I am at liberty to say that I respectfully agree with the judgment of the Court delivered by Mr. Justice Gwynne, whose familiarty with the drainage laws of this Province, their growth and operation, is well known. Speaking for myself, I do not think that the judgment is open to the observations which have been made upon it in the course of the case now in judgment.

I think it is right to refer to the fact that a private Act was recently passed (1 Edw. VII. ch. 72) to validate and confirm the by-law and assessment in question in *Sutherland-Innes Co. v. Romney*(4), notwithstanding the judgment of the Supreme Court, as well as the by-laws of other townships in connection with the drainage scheme of which the Romney by-law and assessment formed part. The general law as to the construction of the clauses of the *Drainage Act* expounded in the judgment of the Supreme Court is left un-

changed, and while reasons of policy and peculiar circumstances may have existed sufficient to invite the interference of the Legislature in this particular case, it cannot but be thought that (though we must not say that the Legislature was *inops consilii*) it was nevertheless *magnas inter opes inops* in permitting some of the recitals which are found in the preamble of the Act to appear there; such for example as the statement that the action in Sutherland vs. Romney (4) was brought by a joint stock company owning lands in the township, "and not engaged in agricultural pursuits but solely in the manufacture of cooperage stock," and setting forth the names of the Judges whose judgments were reversed by the Supreme Court, and of the Judges who took part in the judgment of the latter Court, and of those who were absent and took no part in it. Statements of this kind have a novel appearance in the preamble even of a private Act, as it is, or should be, impossible to suppose that the reasons suggested by them can have had any influence with the Legislature. There is, I believe, one precedent in Ontario legislation for counting the Judges when the object has been to nullify a decision, but the precedent is a vicious one and ought not to be followed.

MacLennan, J.A.:—

I am of opinion that this appeal fails. Since our judgment was pronounced upon the former appeal, the case of Sutherland-Innes Co. vs. Romney(4), has been decided in the Supreme Court, in which it has been held that sec. 75 of the Drainage Act, under which the work here in question was initiated, only authorizes the maintenance or improvement of drains artificially constructed, and is not applicable to the case of a natural watercourse. The effect of that decision is that the report of the engineer was wholly unauthorized, and ought for that reason to be set aside.

The meaning of the expressions "injuring liability" and "outlet liability," and the circumstances under which they may arise under the Act, underwent very full discussion by

the Court in that case, and our former judgment in the present case ought perhaps in some respects to be qualified by that discussion.

There is another ground on which, it appears to me, this appeal ought to fail. It appears from the evidence, and indeed from the engineer's report, that the part of the drainage work which it is proposed to enlarge, improve and extend, and which lies wholly within the township of Rochester, is out of repair, while the other townships have kept the parts of the work within their respective limits in repair. It is clear that the latter townships cannot be assessed for benefit, and, if at all, only for outlet or injuring liability. It would seem, therefore, that they have a right to require Rochester to put their part of the work in repair before calling upon the engineer to make an assessment for enlargement and extension, and to require the element of disrepair to be eliminated from the case upon which he is to exercise his judgment. It may be that when the work is put in a proper state of repair the supposed injury to lands and defect of outlet will, to a great extent, or perhaps wholly, disappear. The other townships are not obliged to submit to the engineer's estimate of the allowance which ought to be made for disrepair when, if Rochester did its duty, the case would be free from that embarrassment.

I think, for these reasons, the appeal should be dismissed, but I agree that the direction for the abandonment of the work should be struck out.

Moss, J.A. :—

I agree that with the variation in the Referee's certificate proposed by the Chief Justice this appeal should be dismissed.

I think that without regard to our individual views as to the state of the law before the decision of the Supreme Court in *Sutherland-Innes Co. vs. Romney*(4), we must now accept it as governing in similar cases arising under the same statutory enactments.

But I may be permitted to refer to the language of the Lord Chancellor in the recent case of *Quinn v. Letham* (5), viz.: "There are two observations of a general character which I wish to make; and one is to repeat what I have very often said before—that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

In the present case the Referee rightly determined that effect should not be given to the engineer's report, but I think he went too far in directing the abandonment of the work.

I wish to add that I see no objection to a scheme of repair and extension being provided for in one by-law. It does not seem to me that an engineer need have any difficulty in separating the cost of the repairs from the cost of the extension work and properly apportioning the cost among the municipalities and lands lawfully chargeable. And I fear the adoption of the other mode would greatly increase the expense of the works.

Lister, J.A.:—

I agree that this appeal should be dismissed. The recent case of *Sutherland-Innes Co. vs. Romney* (4), is, I think, conclusive against the right of the appellants to in any way assess lands in the respondent municipality for any part of the cost of the proposed work. Why sec. 75 of the Act should have been so framed as to make a difference between a purely artificial drainage work and one constructed in a natural watercourse, I am unable to perceive. It may be that the Legislature will, upon consideration, alter the language of the section so as to bring drainage works of the latter class

within its provisions. I wish to add that I cannot assent to the view that a municipality failing to keep a drain within its own limits in repair, as required by sub-sec. 2 of sec. 70, must, before initiating proceedings for the doing of any of the works in relation thereto authorized by sec. 75, put the same in a condition of repair within the meaning of that subsection. I think both classes of work may be authorized and provided for in a single by-law. In such case the engineer would estimate separately the cost of the two classes of work and assess the cost thereof against the lands properly chargeable therewith, distinguishing the cost of reparation from that for work to be done under sec. 75. To hold otherwise would, as it seems to me, impose unnecessary burthens upon municipalities.

*Appeal dismissed.*

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## IN THE HIGH COURT OF JUSTICE.

## DUGGAN VS. TOWNSHIP OF ENNISKILLEN.

*Construction of Drain without By-law—Notice to Owner—Damage to Land—Mode of Computation.*

The defendants in 1888, without a by-law, entered upon the plaintiff's land and dug a drain which caused damage thereto.

Held: In an action for damages that defendants were liable, notwithstanding the failure of the plaintiff to make objections to the work when warned to do so. Mode of estimating damages discussed.

The action was tried at Sarnia on the 9th and 10th of June and the 7th and 8th of July, 1898.

Mr. John Cowan appeared for the plaintiff.

Mr. George Moncrieff, Q.C., for the defendants.

Judgment was delivered at the close of the case by the Drainage Referee, who tried the action.

Thomas Hodgins, Q.C.:—

I think the evidence warrants me in finding that no consent was given by the plaintiff to, and no acquiescence in, the proposed cutting through the plaintiff's land on the occasion of the interview between the reeve and the plaintiff before this ditch was dug. Steadman (the reeve), taking his evidence alone, says he told the plaintiff, who did not approve of the proposed course of the ditch, that if he did not agree to it he (the reeve) would not take it along that course; and he adds that no conclusion was arrived at. He further says that he warned the plaintiff to make objections then, but that he made none, though apparently his objections had been made before. Such a warning cannot be assumed to be a substitute for the statutory notice, which the plaintiff was bound to accept, because he had a right to assume that the municipal council would proceed according to the procedure prescribed by the statute. Under that procedure they



would have had to refer the matter to an engineer as a skilled expert in such matters, with directions to consider and report as to the best way of relieving the upper lands from the large body of water which appears to have been let loose on both the plaintiff's and Denis Duggan's properties.

He had a right, therefore, to consider that the proper statutory proceedings would be taken by the council to carry out a scheme for the relief of these properties, and for the making of a proper outlet to relieve them from this large body of water so let loose upon them. Under that proceeding, after the engineer had reported a proper scheme, there would have to be a by-law provisionally passed and a Court of Revision appointed before which the plaintiff would be called to state his objections, and to make such defence to the action of the council as the law would warrant. But in place of so proceeding the reeve and council took the matter into their own hands and became trespassers by their entry upon and cutting the ditch upon the plaintiff's property without his consent. Now, it is a rule of law that land can not be expropriated or taken for public purposes without compensation, but none was offered or given in this case. The council took land which, according to the evidence before me, was about half an acre of the plaintiff's property, and took it without his leave and without compensation. They not only did that, but they trespassed upon his property and dug a channel-way or ditch for the purpose of carrying down water to the creek, and thereby relieving the lands above. Well, the law would have given them that right if they had taken the procedure which the Municipal Act prescribed, but they did not; and, as I have said, they took the law into their own hands, and are not entitled to the protection of the statute in this case.

Then the effect of the proceedings on the part of the reeve and members of the council in 1887 was practically and eventually to destroy the plaintiff's means of ingress and egress from his farm to the roadway, and to inconvenience him to the extent spoken of by himself and others in the removal of the crops which he or his tenants had raised upon the farm.

Now, by reason of these proceedings on the part of the reeve and council, which the law calls tortious, the question I have to consider is: What damages should be allowed? There are different ways in which the measure of damages may be ascertained, and different considerations in determining their amount. There is the evidence of the depreciation in the value of the farm by reason of this tortious cutting; there is evidence of the damage of the crops to the plaintiff; there is evidence of the cost of fences on both sides of the ditch, and of a bridge, or culvert, so as to give the plaintiff a farm roadway from his flats on to the travelled road.

I think that the proper measure of damages in this case should be the depreciation in value of the farm by reason of the wrongful act of the council in going upon this farm, in damaging it to the extent that they did and have by the enlarging of the ditch, and in depriving him of the means of ingress and egress which he had, prior to their wrongdoing, between his farm and the roadway. The witnesses on the part of the plaintiff give a high estimate of the depreciation in the value of the plaintiff's farm, owing to this wrongdoing of the council. There are about as many on the part of the defence who say that the benefit of the drain to the farm about equals the cost of a bridge. They do not say anything about the value of the land which is taken for the purposes of this drain, but it has apparently been taken into account by some of the witnesses in estimating the damages.

This question of determining how damages should be assessed has often troubled jurors, who have to consider the extreme views of certain witnesses giving a high value, and the extreme views of certain other witnesses in giving another—or no—value for the damage complained of. It has been observed by a learned Judge that juries arrive at values by some sort of a compromise, which indicates that they consider that the true value lies somewhere between the extreme estimates placed on properties by the witnesses. That view was considered by the former Lord Chancellor of Ireland, Sir Anthony Hart, where, in a case reported in 1 Malloy, at p. 457, he said: "There is nothing which raises such differences

of opinion as the value of land. Witnesses vary so widely that I know of no other mode less unsatisfactory than a rough approximation by taking the mean of all their estimates." And I may say that in many cases legally trained intellects have had often to resort to much the same mode of arriving at a conclusion, practically to put themselves in the position of jurors for the purpose of getting at the true value, and have found the truth as lying somewhere between the extreme values placed on property by witnesses.

Now, taking these precedents as my guide, I find that nine witnesses on the part of the plaintiff have proved that the value of the farm has depreciated from \$600 to \$300. Some have put it in another way. McCarthy has stated that about one-fourth of the value of the 20 acres of flats would be a fair way to estimate the depreciation of the farm. That would give \$200. Another witness has said that the 20 acres of flats have been depreciated to about one-half of their value, which would give \$400. Another witness has given the same estimate. Twelve witnesses on the part of the defendants have given their opinion that the benefit of this drain to the farm equals, if it does not exceed, the cost of a bridge. I think, however, the rough and ready way which jurors now and then resort to in arriving at a verdict would be the fairest way to consider the damages to be assessed. Taking the whole number of witnesses who have given evidence as to this question of value and of benefit, and taking the smaller values which the plaintiff's witnesses have put, I find they amount to a certain figure, which, when divided, gives me the sum which I think is the true value instead of either of the extreme estimates placed upon this property by the witnesses, and I, therefore, find that \$167 is the proper sum at which the damages to which the plaintiff is entitled should be assessed, and I assess them at that amount.

COURT OF APPEAL, ONTARIO.

THE SUTHERLAND-INNES COMPANY VS. THE TOWNSHIP OF  
ROMNEY.

(Reported 26 O. A. R. 495.)

*Debentures — Maintenance — Embanking Work — Registration of  
By-laws.*

Section 83 of the Drainage Act, R. S. O. ch. 226, directing that the time for payment of debentures issued for the cost of maintenance of a drainage work shall not exceed seven years, does not apply to debentures issued for the cost of extending, improving, or altering a drainage work, and the municipality has the same power to issue debentures as in the case of an original drainage work.

Because in the course of the construction of a drainage work banks are formed with the spoil cast from the dredge, the work is not one within sub-sec. 2 of sec. 3 of the Drainage Act, R. S. O. ch. 226; that sub-section relates to the reclamation of wet or submerged lands.

Semle: The provisions of the Municipal Act as to the registration of by-laws for contracting debts apply to by-laws for the issue of debentures for drainage works, and when such by-laws have been registered in accordance with the provisions of the Act they cannot be set aside even if originally *ultra vires*.

Judgment of Ferguson, J., affirmed.

Appeal by the plaintiffs from the judgment of Ferguson, J., at the trial.

The action was tried at Chatham on the 17th and 18th of May, 1898, and on the 6th of September, 1898, the following judgment, in which the facts are stated, was delivered.

Ferguson, J.:—

On the 3rd of July, 1897, a by-law, based upon the report of an engineer previously obtained, was finally passed by the municipal corporation of the township of Tilbury West to provide for extending and for otherwise improving Big Creek in the townships of Tilbury North and Tilbury West and for borrowing on the credit of the municipality of Tilbury West the proportion of money to be contributed by Tilbury West for completing the work. According to this report several

township municipalities were respectively required to contribute towards the cost of the work. The sum to be raised and paid by each such municipality was specified in the report and the manner of assessment of lands to raise the moneys required duly provided by the report, so far as I have been able to see, in form at least, in accordance with the provisions of the law upon the subject. The work appears to be a large, extensive, and costly one, and, as was made to appear at the trial, has been proceeded with towards completion, or at least a very large amount of work has been in fact done.

The township of Romney was one of the municipalities to contribute towards the cost of the work (according to the report), and the council of the corporation of Tilbury West, after having adopted the works so reported, duly caused to be served upon the head of the municipality of the township of Romney, the report, plans, profiles, estimates, specifications, and assessments, in respect of the work as provided by the statute. Upon being so served it became the duty (under the drainage laws) of the township of Romney, to pass a by-law to raise and pay over to the treasurer of Tilbury West their proportion of the money required for the work. But they had the right to appeal from the report instead.

As shewn by the evidence, the council of the township of Romney (although they might not have done so) sent a circular letter to each one of the ratepayers in their township, whose lands had been assessed in respect of the work, inviting an assembly of these for the purpose of considering the question as to whether they should adopt the report or appeal therefrom. The plaintiffs were thus notified and invited, but did not pay any attention to the matter so far as has appeared. A large number of such ratepayers, however, did assemble pursuant to the circular notice, and were given full opportunity to examine the report, profiles, specifications, assessments, and all that had been done; no one of them, however, raised any objection or in any way indicated an opinion that there should be an appeal.

After having taken this extra precaution to ascertain the opinions of the ratepayers interested, the council of the township of Romney, by a by-law finally passed on the 11th of October, 1897, made provisions for the raising and paying over of the township's share of the cost of the work according to the report. This by-law is the by-law of the township numbered 601, and it was duly registered under the provisions of section 351 of the Municipal Act of 1892, as before then amended by sec. 7 of 60 Vict. ch. 45, sub-sec. 1 (O.), on the 10th November, 1897.

On the 30th August, 1897, the defendants, the township of Romney, finally passed a by-law to provide for the improvement of No. 4 drain in the township and along the townline between the township of Romney and the townships of Tilbury East and Tilbury West, and its outlet in the east branch of Big Creek, in the township of Tilbury North, and for borrowing on the credit of the municipality the amount of the proportion of money to be contributed by the township of Romney for doing and completing the work. This by-law was based upon the report of an engineer previously obtained in the manner required by law and is by-law numbered 602 of the by-laws of the township of Romney. It was duly registered under the provisions of the Act on the 20th of September, 1897.

These plaintiffs gave notices in good time of their intention to move to have each of these by-laws quashed, but nevertheless did not in either instance make the motion to quash.

The plaintiffs also in each case, that is in respect of each of these by-laws, appealed to the Court of Revision and to the Judge of the County Court. In the appeal in respect to one of the by-laws the plaintiffs obtained some relief by a change being made in respect to their assessments and the other appeal was dismissed.

The action is brought to have it declared that the report as to the drainage works of Big Creek above referred to may be declared invalid and void so far as the same seek to charge the lands in Romney for any portion of the cost of the proposed drainage works on Big Creek and its branches; that

the above-mentioned by-law number 601, of Romney, may be declared invalid and *ultra vires* as being beyond the power and jurisdiction of a municipality to pass, and that it may be removed from the registry as a cloud on the plaintiffs' title, and the debentures issued under the by-law may be cancelled.

Also to have it declared that the report of the engineer upon the alleged further improvement of No. 4 drain may also be declared invalid and void, and that by-law number 602, above mentioned, may also be declared beyond the jurisdiction of the defendant council to pass, and that it may be cancelled and quashed and removed from the registry, and debentures issued under it, if any, declared invalid, and that in any event the defendants be directed to protect and hold harmless the plaintiffs' lands from the assessments under these by-laws or either of them and from any debentures issued thereunder.

The plaintiffs also ask that the defendants be enjoined against further proceeding with either of the said by-laws 601 or 602, or disposing of any debentures issued thereunder, and that their registration be ordered to be removed from the registry office of the county of Kent.

As before stated, each of these by-laws was duly registered under the provisions of the statute. The notices required by sub-section 3 of section 352 have been shewn to have been duly given and published, and so far as I can see all requirements and formalities in respect to such registrations were proved to have been complied with. By sec. 352, sub-sec. 1, of the Act of 1892, as amended by the Act of 1897, it is enacted that every such by-law (referring to the by-laws mentioned in section 351) so registered, or registered before the sale of such debentures, and the debentures issued thereunder, shall be absolutely valid and binding upon the municipality according to the terms thereof and shall not be quashed or set aside upon any ground whatever unless an application or action to quash or set aside the same be made to a court of competent jurisdiction within three months from the registry thereof, and a certificate under the hand and

seal of the clerk of the Court stating that said action or proceeding has been brought or application made shall have been registered within the said period of three months. As shewn by the evidence of McKean, the deputy registrar, the certificate of the pendency of this action was dated and registered on the 15th of February, 1898, more than three months after the latest of the registrations of these two by-laws. The evidence of the same witness shews that this one is the only certificate registered in respect to this or any other action, proceeding, or application, in regard to these by-laws or either of them. Each of these by-laws is a by-law for contracting a debt by the issue of debentures for a longer term than one year and for levying rates for the payment of such debt on the ratable property of a part of the municipality, and if nothing more were to be said, the matters in contention would, as I think, have to be decided against the plaintiffs on this short and single ground, namely, the due registration of these respective by-laws, and the want of registration, within the prescribed period, of any certificate of the pendency of any proceeding, or application, attacking them or either of them.

It was, however, contended on behalf of the plaintiffs, that the provisions regarding the registration of by-laws for contracting debts by way of issuing debentures, have no application to drainage by-laws such as these, or to any drainage by-laws, that expression being used and apparently fully understood.

After a perusal of all the statutes or enactments bearing on the subject I am not of this opinion. On the contrary, I think the provisions do apply, and (as I think), enough appears in the judgment in *Broughton v. Grey* (1897), (1) (a case apparently decided under the provisions of section 590 of the Act of 1892), to shew that such is the view taken by the Supreme Court. At p. 509, the learned Judge who delivered the judgment of the Court, in dealing with the question as to whether or not the action had been brought

(1) (1897) 27 S. C. R. 495.



too early, and whether the plaintiff should not have waited till after the passing of the by-law instead of seeking to restrain the passing of it, said: "Greater difficulties might be raised to his seeking redress if the by-law should be, as it might, and no doubt would be, registered under sections 351 *et seq.* of the Municipal Act of 1892." It seems to me clear that the provisions regarding registration do apply. I can find no good reason for thinking they do not apply to what are called drainage by-laws. On behalf of the plaintiffs it was also contended that even if these provisions as to registration do apply to drainage by-laws, they can only apply to such by-laws as there was jurisdiction or power to pass, and that each of these by-laws is *ultra vires*. The section 351, above referred to, is general and comprehensive in its terms. It says: "Every by-law passed by any municipality for contracting any debt," and it is silent as to the existence or not of the proper power to pass the by-law. Section 352 gives the period of three months in which to attack the by-law by an application or action to quash or set it aside, and positively provides that unless such application or action is made or brought, and the certificate registered within the period mentioned, the by-law shall not be quashed or set aside on any ground whatever, and that the by-law and the debentures issued under it shall be absolutely valid and binding.

These enactments seem very strongly to shew that a by-law so registered and not attacked and the certificate registered within the time prescribed, is valid and binding even although the by-law is one that the municipality had not proper power to pass. Surely the fact of a by-law being *ultra vires* would be a ground of attack, and section 351 says that in such circumstances the by-law shall not be quashed or set aside on "any ground whatever." If I had to decide the case on this short ground my opinion would be against the plaintiffs' contention, but I am not driven to decide this immediate point, for having thoroughly re-perused the evidence I am of opinion that the municipality of Romney had power to pass these by-laws. As to by-law 601, it was contended that inasmuch as the plaintiffs' lands in Romney lay very high and

had a good and sufficient outlet for their water independently of the improved outlet provided for by the by-law of Tilbury West, such improved outlet was not an improved outlet for the waters of these lands, and that the land in Romney could not, therefore, be properly taxed in respect of the outlet or for "injuring liability."

The work provided for by the by-law of Tilbury West was a very extensive one, and was undertaken, as was said, under the provisions of section 75 of the Act of 1894. I think the witness Thomas Anderson, clerk of the municipality of Tilbury West, said, not inaptly, that it was a work for improving the drainage system. No doubt a very great improvement in the outlet was contemplated, and has virtually been made. The distance from this outlet at or near the waters of the lake to the plaintiffs' lands in Romney is stated to be about 13 miles. Some witnesses say a little more. There can be no doubt that a very large volume of water is discharged through it.

On the evidence the fall from the plaintiffs' land to the outlet is less than one inch in ten rods. On some of the evidence much less. This, to me, represents almost still water in the drain, and if nothing more were urged, I should be quite unable to perceive how any great enlargement and improvement of an outlet where this one is would not be and constitute an "improved outlet" *quoad* the plaintiffs' land. It was contended that notwithstanding there is only this small elevation of the plaintiffs' land above the outlet, yet that the conformation of the surface between the outlet and the plaintiffs' land was such that there was a good and sufficient outlet for the water from the plaintiffs' land independently of the improved outlet provided for and made under the by-law of Tilbury West. Evidence was given for the purpose of establishing this alleged fact. This evidence I heard, and I have since perused it carefully, and I think it utterly fails. It was very unsatisfactory evidence for the purpose, and, as I think, entirely insufficient, and I am of the opinion that the outlet in question is an "improved outlet" as to the plaintiffs' land. On all the evidence I am unable to

perceive how this fact can be otherwise, and there is no doubt that the plaintiffs used the outlet.

Sub-section 4 of section 3 of the Act of 1894 provides that all the lands and roads of any municipality, corporation, or any individual using any drainage work as an outlet, or for which when the work is constructed an improved outlet is thereby provided either directly or through the medium of any other drainage work, or of a swale, ravine, creek, or watercourse, may, under all the formalities and powers contained therein, except the petition, be assessed and charged for the construction and maintenance of the drainage work so used as an outlet or providing an improved outlet.

Sub-section 3 makes provision for what is called "injuring liability."

Sections 59 and 60 of the same Act extend the principles of the provisions of sub-sections 3 and 4 to adjoining and neighbouring municipalities, and provide for assessing and charging these. It seems to me clear on the evidence and the provisions of the Drainage Acts that there was power to assess and charge the plaintiffs' lands for a proper proportion of the cost of the works under the by-law of Tilbury West, and that the municipality of Romney was not acting in excess of their powers in adopting that by-law and passing the by-law they did, namely, by-law 601, so far as assessing and charging the lands in Romney were concerned.

As to by-law 602: This is a by-law for improving a drain known as No. 4 drain. This by-law is an original by-law of this township in respect of a work in the township and on its boundary, and I have discovered nothing to enable me to say that the municipality has not full power to legislate on the subject. The evidence shows, I think, that this was a work of improvement and extension done also under the provisions of section 75 of the Act of 1894. It is, likewise, an extensive work.

On behalf of the plaintiffs it was contended that the provisions of section 83 apply, and that there was no power to provide for the issue of debentures payable in ten years, as

was done in the cases of both by-laws, and that the debentures should have been made payable within seven years.

This contention rests upon the assumption that each of these works is a work of maintenance, such as is mentioned in this section 83. I am, however, of the opinion that such is not the case, and that each of the works must be considered as works of reconstruction, improvement, and extension, under the provisions of section 75, and not works of mere maintenance, such as are referred to in section 83.

There were some other contentions on behalf of the plaintiffs against the existence of the power to pass the by-laws, but I do not think any of them should succeed. These were of a minor character, and I do not think that any of them is tenable. I am, on the whole case, of the opinion that each of the by-laws 601 and 602 was within the power of the municipality of Romney to pass. Each was duly registered as before stated. The plaintiffs were too late in registering the certificate of *lis pendens*, if I may call it by that name. Each of these by-laws should stand as good and valid, and the plaintiffs' action must be dismissed with costs.

The appeal was argued before Burton, C.J.O., MacLennan, Moss, and Lister, J.J.A., on the 3rd and 4th of October, 1899.

Atkinson, Q.C., for the appellants.

J. B. Rankin, for the respondents.

November 14th, 1899. The judgment of the Court was delivered by

Lister, J.A.:—

I think the judgment of my brother Ferguson ought to be affirmed for the reasons there given.

I shall add a very few words in respect of two points raised by the appeal on the part of the plaintiffs.

The first is that the by-laws are fatally defective in this that they extend the time for payment of the debentures thereby authorized to be issued, beyond a period of seven

years from the date thereof; and the other is that by reason of the dredging of a portion of Big Bear Creek, provided for in the engineer's report, and the formation of banks with the spoil cast from the dredge, the work was in fact an embanking drainage work within the meaning of sub-section 2 of section 3 of "the Drainage Act, 1894," and because the by-law authorizing the work was not founded upon a petition of two-thirds of the owners within the area as in that sub-section prescribed, the work was unauthorized, and by-law 601 of the defendant municipality, was *ultra vires* and is illegal and void.

Neither objection, as it appears to me, can be sustained.

The first is based upon section 83 of the Act, which provides that "Where the maintenance of any drainage work is so expensive that the municipal council liable therefor deems it inexpedient to levy the cost thereof in one year, the said council may pass a by-law to borrow upon the debentures of the municipalities payable within seven years from the date thereof, the sum necessary for the work, or its proportion thereof," etc.

Obviously this section relates to the issue of debentures to meet the cost of work in respect of maintenance, *i.e.*, the preservation and keeping in repair of a drainage work, which the municipality is under statutory obligation to preserve and keep in repair, and has no application whatever to debentures issued to meet the cost of extending, improving, or altering a drainage work, executed under the authority of section 75 of the Act, which confers upon the municipality doing that work the same powers as regards the issue of debentures to meet the expense thereof as is conferred by the Act for the expense of constructing an original drainage work.

And I think it is also clear that the embanking of that part of Big Bear Creek authorized by the by-law of Tilbury West, cannot be looked upon as bringing the drainage work under sub-section 2 of section 3 of the Act, even although it may be necessary in order to make the work more effective.

Manifestly sub-section 2 of section 3 relates to the reclamation of wet or submerged lands by embanking and the operating of pumping works authorized by section 181 of the Act; in fact, just such works as are at present operated on the plains near Wallaceburg.

It may be proper to notice that during the argument it was stated by counsel for the defendants, and not contradicted by counsel for the plaintiffs, that the embanking added nothing to the cost of the work, as it consisted merely of the spoil discharged from the spoon of the dredge.

The appeal must be dismissed.

*Appeal dismissed.*

NOTE.—Reversed by Supreme Court. See next page.

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## SUPREME COURT OF CANADA.

THE SUTHERLAND-INNES COMPANY,  
(Plaintiff), Appellant;

AND

THE TOWNSHIP OF ROMNEY,  
(Defendant), Respondent.

(Reported 30 S. C. R. 495.)

ON APPEAL FROM THE COURT OF APPEAL FOR  
ONTARIO.

*Drainage Works—Municipal Corporation—Improvement of Natural Watercourses—Artificial Watercourses—Embankments—Dykes—The Drainage Act, 1894, 57 Vict. ch. 56 (Ont.)—The Ontario Drainage Act, 1873—The Municipal Drainage Aid Act—36 Vict. ch. 39—36 Vict. ch. 48 (Ont.)—Benefit Assessment—Injuring Liability—Outlet Liability—Assessment of Wild Lands—Construction of Statute.*

The Ontario Act 57 Vict. ch. 56 has not abrogated the fundamental principle underlying the provisions of the previous Acts of the Legislature respecting the powers of municipal institutions as to assessments for the improvement of particular lands at the cost of the owners, which rests on the maxim *qui sentit commodum sentire debet et onus*.

Lands from which no water is caused to flow by artificial means into a drain having its outlet in another municipality than that in which it was initiated, cannot be assessed for "outlet liability" under said Act.

Where a drainage work initiated in a higher municipality, obtains an outlet in a lower municipality, the assessment for "outlet liability" therein is limited to the cost of the work at such outlet. Every assessment, whether for "injuring liability" or for "outlet liability," must be made upon consideration of the special circumstances of each particular case and restricted to the mode prescribed by the Act. In every case there must be apparent water which is caused to flow by an artificial channel from the lands to be assessed into the drainage work, or upon other lands to their injury, which water is to be carried off by the proposed drainage work.

Assessment for "benefit" under the Act must have reference to the additional facilities afforded by the proposed drainage work for the drainage of all lands within the area of the proposed work, and may vary according to difference of elevation of the respective lots, the quantity of water to be drained from each, their distances from the work and other like circumstances.

Present: Taschereau, Gwynne, Sedgewick and Girouard, JJ.

Section 75 of that Act only authorizes an assessment for repair and maintenance of an artificially constructed drain. The cost of widening and deepening a natural watercourse for the purpose of draining lands is not assessable upon particular lands under said section 75, but must constitute a charge upon the general funds of the municipality.

In the present case, the scheme proposed was mainly for the reclamation of drowned lands in a township on a lower level than that of the initiating municipality, and such works are not drainage works within the meaning of said section 75 for which assessments can be levied thereunder, nor are they works by which the lands in the higher township can be said to have been benefited.

Appeal from the judgment of the Court of Appeal for Ontario (1), affirming the judgment of Mr. Justice Ferguson at the trial, which dismissed the plaintiff's action with costs.

The action was to set aside a by-law (No. 601) of the township of Romney, and the report and proceedings on which it was based whereby certain wild lands, situate in that township, were assessed for "outlet" and "injuring" liability in respect to lands in the adjoining township of Tilbury North, and for repairs to certain drainage works and improvement of streams and dykes constructed in connection therewith in the township of Tilbury North; and also to set aside another by-law (No. 602) of the township of Romney, assessing said lands for outlet charges and maintenance of other drains in the township of Romney, and to have both by-laws declared *ultra vires* of the corporation of the township of Romney.

A statement of the circumstances under which the action was taken and the questions at issue upon this appeal will be found in the judgment of the Court, delivered by His Lordship Mr. Justice Gwynne.

Atkinson, Q.C., and M. Wilson, Q.C., for the appellant.—Actions similar to this have frequently been before the Ontario Courts. See *Sweeney vs. The Corporation of Smith's Falls* (2), *Broughton vs. Townships of Grey and Elma* (3).

West Tilbury was not bound to keep these drains in repair, and lands in Romney could not, therefore, be assessed

(1) 26 Ont. App. R. 495.

(2) 22 Ont. App. R. 429.

(3) 27 Can. S. C. R. 495.



for the cost of repairs. *Re Township of Mersea and Township of Rochester* (4).

As to the powers of the municipality under section 75 of 57 Vict. ch. 56, see *In re Stonehouse and Plympton* (5), and as to "injuring liability," *Scott vs. Town of Peterborough* (6).

Aylesworth, Q.C., and Rankin, Q.C., for the respondent.—That improvement work can be done without a petition, see *Re Townships of Caradoc and Ekfrid* (7), *Re Stonehouse and Plympton* (5), and see also *Bickford vs. Corporation of Chatham* (8).

The judgment of the Court was delivered by

Gwynne, J.:—

This is an appeal from a judgment of the Court of Appeal for Ontario affirming a judgment of the High Court dismissing an action instituted by the appellants to restrain the respondents, the Municipality of Romney (for reasons stated in the statement of claim) from enforcing two certain by-laws numbered respectively 601 and 602, passed by the municipal council of the township of Romney against the lands of the appellants in the pleadings mentioned, situate in the township of Romney, and for other relief.

These by-laws profess to have been passed by virtue of authority claimed to have been conferred by an Act of the Legislature of Ontario, 57 Vict. ch. 56, intituled, "An Act to consolidate and amend the Drainage Laws," whereas the contention of the appellants is that, upon the facts appearing in evidence, the said consolidated Act did not confer any authority to affect the lands of the appellants with the burden purported to be imposed upon them by the said by-laws. The objections to these by-laws, relied upon by the appellants, rest upon different considerations, and so they must be dealt with separately.

(4) 22 Ont. App. R. 110.

(6) 19 U. C. Q. B. 469.

(5) 24 Ont. App. R. 416.

(7) 24 Ont. App. R. 576.

(8) 14 Ont. App. R. 32; 16 Can. S. C. 235.

The by-law 601 purports to be a by-law passed by the municipal council of Romney for the purpose of giving effect to a by-law of the municipality of the township of Tilbury West, assuming to impose a burthen upon the lands of the appellants situate in Romney to bear a part of the cost of certain works mentioned in a by-law No. 45 of the township of Tilbury West, passed in 1897 under the title of. "A by-law to provide for Extending and Otherwise Improving Big Creek, in the Townships of Tilbury North and Tilbury West."

The questions arising in this appeal necessitate a review of the several Acts of the Province relating to drainage works, but it will not be necessary to go further back than the year 1873, upon the 29th of March in which year two Acts of the Legislature of Ontario were passed, the one being 36 Vict. ch. 38, intituled, "An Act to Authorize a Further Expenditure of Public Money for Drainage Works," to which by the Act is given the short title of "The Ontario Drainage Act, 1873"; and the other being 36 Vict. ch. 39, intituled, "An Act to Authorize the Investment of Certain Moneys in Debentures to be issued for the Construction of Drainage Works by Municipalities." This Act, by section 29, is given the short title of the "Municipal Drainage Aid Act."

The first section of this Act repealed a former Act, 35 Vict. c. 26, and substituted therefor, in the precise language of the repealed Act, the provisions following, among others:

2. In case the majority in number of the owners as shewn by the last revised assessment roll to be resident on the property to be benefited in any part of any municipality, do petition the council for the deepening of any stream, creek or watercourse, or for the draining of the property (describing it), the council may procure an examination to be made by an engineer or provincial land surveyor, of the stream, creek or watercourse proposed to be deepened, or of the locality proposed to be drained, and may procure plans and estimates to be made of the work by such engineer or provincial land surveyor, and an assessment to be made by such engineer or surveyor of the real property to be benefited by such deepening or drainage, stating as nearly as may be in the opinion

of such engineer or provincial land surveyor, the proportion of benefit to be derived by such deepening or drainage by every road and lot or portion of a lot, and if the council be of opinion that the deepening of such stream, creek or watercourse, or the draining of the locality described or a portion thereof would be desirable, the council may pass by-laws; . . .

1. For providing for the deepening of the stream, creek or watercourse or the draining of the locality.

2. For borrowing on the credit of the municipality the funds necessary for the work and for issuing the debentures of the municipality therefor.

3. For assessing and levying in the same manner as taxes are levied upon the real property to be benefited by the deepening or draining, a special rate sufficient for the payment of the principal and interest of the debentures, and for so assessing and levying the same . . . by an assessment and rate on the real property so benefited . . . as nearly as may be to the benefit derived by each lot or portion of lot and road in the locality. . . .

4. For regulating the times and manner in which the assessment shall be paid. . . .

5. For determining what real property will be benefited by the deepening or draining and the proportion in which the assessment should be made on the various portions of lands so benefited. . . .

Subject, however, to appeal before the Court of Revision, and from thence to the Judge of the County Court as in the case of ordinary assessments.

The above provisions relate to works constructed wholly within the limits of the municipality passing the by-law for its construction, and which works confer benefit only on lands situate within the limits of such municipality.

Then section 6 of the Act enacted that :

6. Whenever it is necessary to continue the deepening or drainage aforesaid beyond the limits of any municipality, the engineer or surveyor employed by the council of such municipality may continue the survey and levels into the adjoining municipality until he finds fall enough to carry the water

beyond the limits of the municipality in which the deepening or drainage was commenced.

Then section 7 provides for the case of lands outside of the municipality in which such work of deepening or draining is constructed being benefited by such work in an adjoining municipality as follows :

7. When the deepening and drainage do not extend beyond the limits of the municipality in which they are commenced, but in the opinion of the engineer or surveyor aforesaid benefit lands in an adjoining municipality, or greatly improve any road lying within any municipality or between two or more municipalities, then the engineer or surveyor aforesaid shall charge the lands to be so benefited . . . with such proportion of the cost of the work as he may deem just.

Then by section 8 it is enacted that the engineer or surveyor aforesaid shall determine and report to the council by which he was employed whether the deepening or drainage shall be constructed and maintained solely at the expense of such municipality or whether it shall be constructed and maintained at the expense of both municipalities, and in what proportion.

Provision then is made for service, by the council of the municipality undertaking such work, upon the head of the council of an adjoining municipality, the lands in which are so benefited, of a copy of the report, plans and specifications of the engineer so far as they affect such last mentioned municipality. And in section 10 it is enacted that "unless the same is appealed from as hereinbefore provided it shall be binding on the council of such municipality," which council is required in such case by section eleven to "pass a by-law in the same manner as if a majority of the owners resident on the lands to be taxed had petitioned as provided in the first section of this Act to raise such sum as may be named in the report, or in case of an appeal, for such sum as may be determined by the arbitrators."

Provision is then made for an appeal by the council of the adjoining municipality whose lands or roads are to be

benefited as aforesaid to arbitrators to be appointed, one by the council of each of the said municipalities and a third by the two so chosen, whose award is, by section 15, declared to be binding upon all parties, and that a copy shall be registered with the Registrar of Deeds for the county in which either of the municipalities is situated.

Then by section 17 it was enacted that "after such deepening or drainage is fully made and completed, it shall be the duty of each municipality in the proportion determined by the engineer or arbitrators, as the case may be, or until otherwise determined by the engineer or arbitrators, under the same formalities as near as may be as provided in the preceding sections, to preserve, maintain and keep in repair the same within its own limits either at the expense of the municipality or parties more immediately interested, or at the joint expense of such parties and the municipality, as to the council, upon the report of the engineer or surveyor may seem just, and any such municipality neglecting or refusing so to do upon reasonable notice being given by any party interested therein, shall be compelled by mandamus to be issued from any court of competent jurisdiction to make from time to time the necessary repairs to preserve and maintain the same, and shall be liable to pecuniary damage to any person whose property shall be injuriously affected by reason of such neglect or refusal."

Then by section 18 it was enacted that "should a drain already constructed or hereafter constructed by a municipality be used as an outlet or otherwise by another municipality, company or individual, such municipality, company or individual using the same as an outlet or otherwise may be assessed for the construction and maintenance thereof in such proportion and amount as shall be ascertained by the engineer, surveyor or arbitrators under the formalities provided in the preceding sections."

Then by section 27 it was enacted that all disputes as to damages alleged to have been done to any property in the construction of drainage works or consequent thereon should be referred to arbitration in the manner provided in the Act,

and that the award made thereon should be binding upon all parties.

All of the above provisions were repeated in the Municipal Institutions Act [36 Vict. ch. 48], passed in the same session of the Legislature of Ontario, by which Act it was further, among other things, enacted, section 372, sub-section 10, that the council of every municipality may pass by-laws "for opening, making, preserving, improving, repairing, widening, altering, diverting, stopping up and pulling down drains, sewers or watercourses within the jurisdiction of the council;" this enactment plainly related to the general powers of municipal councils over property within the municipality and had no reference to any drainage work of the character of drains constructed, or to be constructed by a municipality under the provisions of the special local acts relating to drains constructed at the cost of the parties whose lands should be specially benefited by such works.

Prior to the month of February, 1875, two drains had been constructed in the township of Romney and wholly at the cost of that township, and the lands therein benefited thereby, under the provisions of the Act above set out; one of these drains, called the Campbell Drain, commenced at a point in the westerly end of the third concession of the township and extended from thence northerly along the line between lots numbers eighteen and nineteen to the town line constituting the northern limit of the township of Romney and the southern limit of the township of East Tilbury. From this point the drain was continued westerly along the Romney side of the said town line to the north-west angle of Romney, from which point it was continued into and across two lots in the ninth concession of Tilbury West for the distance of about 196 rods, where it was connected with a natural stream or watercourse, called the East Branch of Big Creek, which, rising close by that spot, flows down a natural descent of fifteen feet in three miles to a point in lot fifteen, in the seventh concession of Tilbury West called "The Forks," where its waters flow into another natural stream or watercourse called "Big Creek," which rises in the westerly

end of the eighth concession of the township of Mersea (which lies west of Romney and south of Tilbury West), and after crossing several concessions in Mersea and in Tilbury West, its waters become united with the waters of the stream called the East Branch at the place called "The Forks," from which point the waters of the two streams flow as one stream to its outlet into the River Thames about half a mile east of where the Thames falls into Lake St. Clair. The other of these drains in Romney is called "Drain No. 4," which, commencing at a point in the easterly end of the third concession in Romney, runs northerly to the northerly limit of the said township opposite to the township of East Tilbury at a point where the line between the fourth and fifth concessions of Romney intersects the north town line of Romney, from which point it extends westerly along the Romney side of the said town line until it reaches the point where the Campbell drain reached the same town line; from that point the Campbell drain was deepened and widened to the north-west angle of Romney and thence for the aforesaid distance of 196 rods into Tilbury West, where connection was made as aforesaid with the said stream called the East branch, which thus became the outlet of these two drains.

The extension of these two Romney drains into Tilbury West until fall enough was found to carry the waters coming down the drains beyond the limits of the township of Romney, was in perfect accordance with the provisions of 36 Vict. ch. 39, sec. 6 (above extracted), and the outlet so reached being a natural stream or watercourse, the Romney drains so conducted into it had as perfect a right to the use of it as such outlet as if the stream where the combined drains reached it had been, and for some distance had continued to be, within the township of Romney.

At this same time the council of the township of Tilbury West had procured two land surveyors, Mr. Augustine McDonell and a Mr. J. S. Holwell, to design and make plans of several drainage works within the township. The council of the township declined to undertake themselves the construction of the works or any of the works which were by

these gentlemen respectively designed and suggested upon the ground, as is said, that they were too expensive for construction under 36 Vict. ch. 39, but they made application to the Provincial Government to construct them under the provisions of 36 Vict. ch. 38.

Upon the 3rd June, 1875, the township clerk of the township addressed a letter to the chief engineer of public works in the Province in the terms following:

“Township Clerk’s Office,  
Tilbury West, 3rd June, 1875.

“Sir,—In reply to your letter of the 26th April now last past, addressed to Pierre Tremblay, Esq., Reeve of Tilbury West, respecting drainage works in Tilbury West which have been surveyed by Messrs. Holwell and McDonell, civil engineers, I am directed by the council of Tilbury West to inform you that the said municipal council are very desirous for the government to undertake the construction of all the drainage works embraced in both the said surveys.

“You will see by turning over this leaf that the council laid this matter before the ratepayers in open meetings of the council, and there was not one word said against the council applying to the government to undertake the construction of the said drainage works.”

And upon the 3rd July, 1875, Mr. Pierre Tremblay, reeve of the township, addressed a letter to the Hon. C. F. Fraser, Commissioner of Public Works for the Province of Ontario, in the terms following:

“Sir,—The Municipal Council of Tilbury West, county of Essex, desire the following drainage works constructed under the provisions of the Ontario Drainage Act, 36 Vict. ch. 38, viz.: “The Tremblay Creek Drain,” “Big Creek Outlet,” and the two branches thereof; also the creek known as “Little Creek” from the lake southerly as far as necessary, and the drains called Nos. 1, 2, 3 and 4 of Mr. Holwell’s survey.”

By this statute, 36 Vict. ch. 38, it was enacted that the Commissioner of Public Works on the written application



of the council of any municipality, or on the petition of a majority of the owners, as shewn on the last revised assessment roll resident on the property to be described in the petition, the whole or any portion of which is to be benefited by the drainage, may undertake and complete the same as if the council had applied for the drainage. Then it was enacted that the Commissioner of Public Works should notify the council of any municipality in which drainage works had been executed under the provisions of the Act, requesting them to appoint three assessors who should assess all lands and roads benefited by such drainage. The Act then, in the 14th section, enacted that as soon as conveniently might be after any works for the drainage or improvement of any lands authorised to be executed under the Act should have been completed, the commissioner should furnish the assessors with a map of the municipality with the drain or drains marked upon it, and a statement of the sums expended in and about the works so executed, upon receipt of which, assessors should inspect the lands and assess them, setting opposite each parcel of land the proportion which ought to be payable in respect of the several parcels.

Then in sec. 16 provision was made to the like effect as in sec. 7 of 36 Vict. ch. 39, that when the drainage works do not extend beyond the limits of the municipality in which they were commenced, but in the opinion of the assessors benefit lands in an adjoining municipality, then that the assessors should charge the lands so benefited with such proportion of the cost of the works as they might deem just; like provision then was made for an appeal by the council of the municipality whose lands are benefited without the drainage works being continued thereinto, to arbitrators whose award, as provided in simile casu in 36 Vict. ch. 39, should be final upon all parties. Then in sec. 25, provision was made for the maintenance and keeping in repair of the drainage works executed under the Act at the expense of the parties whose lands respectively are benefited by the works to the like effect as is provided in sec. 17 of 36 Vict. ch. 39. Then sec. 26 enacted that should any drain constructed under

the provisions of that Act, 36 Vict. ch. 38, be used as an outlet or otherwise by any other municipality, company or individual, such municipality, company or individual might be assessed for the construction and maintenance of the drain so used as an outlet in such proportion and amount as should be ascertained by the assessors or arbitrators under the formalities provided in the preceding sections.

We have seen by the above letter of the 3rd July, 1875, that the works which the Commissioner of Public Works was requested to execute under the provisions of 36 Vict. ch. 38, consisted of nine several separate and distinct works, and as such when all were completed they were, in the year 1878, returned for the purpose of assessment of the lands benefited by the said several works respectively under the provisions of the said Act then consolidated as chapter 33 in the Revised Statutes of Ontario, 1877. The drain called Tremblay Creek Drain is a natural stream or watercourse called "Tremblay Creek," which rises in Tilbury East, which several artificially constructed drains, constructed under the provisions of the Municipal Drainage Acts, now use as their outlet. This stream enters Tilbury West in lot 22, in the 6th concession of that township, and after crossing the line between the townships Tilbury East and Tilbury West, and running by a devious course across the 6th, 5th, 4th, 3rd and 2nd concessions (in which latter concession it passes under the Canadian Pacific Railway on lot No. 20), and after crossing said lot No. 20 enters Big Creek proper at or about the centre line of the south half of lot No. 19 in the first concession. The cost of this work as returned for assessment of the several parcels of land benefited by it is \$4,156.79.

The drain called "Little Creek" drain is a small natural watercourse which rises in or about lot No. 10 in the seventh concession of Tilbury West, runs into and through the lots numbered 11 in the several concessions in a northerly course to the second concession, in which it enters lot No. 10, and thence enters lot No. 10 in the first concession, an angle of which it crosses into lot No. 11 in the first concession and flows through the last mentioned lot northerly and lot

No. 11 in the broken front concession; in which lot, passing under the Grand Trunk Railway, it empties its waters directly into Lake St. Clair. The cost of this work as returned for assessment of the several parcels of land benefited by it is \$6,095.96. The course of this work is distant from and lying to the west of Big Creek proper by from one and one half to two and a half miles.

The work called the West Branch Drain was work done also in a natural stream or watercourse, namely, that part of the stream called Big Creek, which rising, as already said, in the township of Mersea, flows across Mersea and Tilbury West, until, under the name of "The West Branch," it reaches the point called the "Forks" on lot 15 in the seventh concession. From this point to its mouth the stream is called Big Creek proper. The cost of the work done in this West Branch as returned for assessment of the several parcels of land benefited by that work was \$5,305.26.

The drains designated by numbers " 1, 2, 3, and 4 of Mr. Holwell's survey," were wholly artificially constructed drains situate respectively in the 7th, 9th, 10th and 11th concessions of Tilbury West, west of the West Branch, into which as their outlets they respectively debouch in those respective concessions, and the cost of the construction of each, as returned for assessment of the several parcels of land benefited by each of these respective works, was as follows:

|  |            |
|--|------------|
| No. 1 Drain in 7th concession . . . .    | \$2,836.99 |
| No. 2 Drain in 9th concession . . . . .  | 2,348.93   |
| No. 3 Drain in 10th concession . . . . . | 2,545.51   |
| No. 4 Drain in 11th concession . . . . . | 2,018.74   |

The work done upon the Big Creek proper extended from the Forks in lot 15, in the seventh concession, to the concession line between the third and fourth concessions at lot No. 18. The distance of this point from the shore of the Lake St. Clair, in the broken front concession, is fully four and a half miles in about a due north direction, while the distance along the stream which here takes a more north-easterly and easterly direction to its mouth in the River Thames, east of Lake St. Clair, is between six and

seven miles. The greatest height of any land between this concession line and the lake in this neighbourhood is said to be three feet. All the evidence concurred in saying that the height varied from one to three feet. A witness who had been employed on this work, which was executed by the Ontario Government in 1878, says that the work was carried as far as it could be because of the waters of the lake, which were so very high then. The cost of this work, as returned for assessment of the several parcels of land benefited by it, was \$5,983.32.

The only other work comprehended in the works thus undertaken by the Provincial Government was done upon the East Branch stream, which also is a natural stream or water-course, and the work done upon this stream, which as already mentioned had a fall of fifteen feet to its mouth at the Forks, a distance of three miles, and in which the two drains in Romney had their outlet, extended from about the point where the Romney drains in one channel debouched into the said East Branch about half a mile or three-quarters of a mile distant from the north-west angle of Romney to the mouth of the said East Branch stream at the Forks. The cost of the work done on this stream, as returned for assessment of the several parcels of land benefited by this work, was \$3,570.34.

Now it appears to be clear beyond all controversy that no lands in Romney derived, or could by possibility be supposed to derive, any benefit whatever from the work done on the Little Creek, which debouched into Lake St. Clair at a point in the broken front concession of Tilbury West, about three miles west of the mouth of Big Creek. So neither could any lands in Romney be supposed to derive any benefit from the work done upon Tremblay Creek, which emptied into Big Creek in the first concession of Tilbury West about two miles from its mouth, but where its waters in their natural state were almost, if not actually, upon a level with the waters of Lake St. Clair; nor from the work done in any of the drains numbered "1, 2, 3, and 4 of Mr. Holwell's survey" as above described; nor from the work done on Big Creek

proper itself—that is to say, between the place called “The Forks” and the termination of the work at or about the line between the third and fourth concessions.

The only work by which the lands in Romney could have been supposed to have been benefited was the work done on the East Branch stream by deepening, and it may be widening, that stream where it had been so as aforesaid made the outlet of the Romney drains above mentioned. The improvement of this outlet constituted the sole benefit conferred upon lands in Romney. The cost of this work as we have seen was \$3,570.34.

Now, I think it may fairly be assumed that the assessors to whom was intrusted the duty to determine the amount chargeable to lands in Romney for such benefit, did as I think they should have done, that is to say, did according to the best of their judgment, charge all the Romney lands benefited **by apportioning to those lands** such proportion of the cost of that work as they considered fair and just, having regard to the value to those lands of the **improvement to the outlet** of the Romney drain so as aforesaid made into the **said East Branch stream**. The assessors determined all the lands in Romney which were so benefited, and upon a roll they set opposite to each lot the amount chargeable to each; and here it may incidentally be remarked that lots Nos. 21, 22, and 23, in the third concession (450 acres of which are now owned by the appellants and have been charged by the by-law of Tilbury West, which the by-law 601 of Romney has been passed to give effect unto, with the sum of \$414.42, notwithstanding that some time since 1878 the council of the township of Romney have, under the provisions of 36 Vict. ch. 39, constructed a drain along the front of said lots in the 3rd concession, which by a tunnel through a ridge of high land which separates the water flowing into Lake St. Clair from those flowing into Lake Erie, whereby means of drainage of the said lots in the 3rd concession into Lake Erie is supplied in relief of the No. 4 drain in Romney), were not entered as lands benefited and were not charged with any sum. The total amount chargeable to lands in Romney, as.

adjudged by the assessors, was \$2,127, or about two-thirds of the cost of the work done in the East Branch; of this amount the sum charged to lands in the fourth and fifth concessions now owned by the appellants containing in the whole 1,000 acres, was \$120. Upon appeal by the council of Romney from this assessment it was reduced by an award made by arbitrators under the provisions of the statute in that behalf who adjudged and awarded as follows:

“That the said assessment be reduced from the said sum of two thousand one hundred and twenty-seven dollars to the sum of twelve hundred dollars, said sum to be distributed and apportioned over and upon the said lands and highways particularly specified in the said assessment roll in the same relative proportion that they bear one to the other at present, in and by the said roll, the said reduction being equal to about forty-three per cent. and three-fifths of one per cent. upon each of the respective assessments.”

The effect of this award was to reduce the sum total of the charge upon the lands now owned by the appellants as aforesaid from \$120 to \$67.70.

Now that award so made operated as a conclusive adjudication of what lands in Romney were benefited by the works constructed, and it operated as I think further, by force of the statutory provisions in that behalf, as determining conclusively and judicially the utmost extent to which the lands so benefited in Romney and so assessed for cost of construction, could be charged for the cost of the repair and maintenance of the work from time to time when necessary.

All of the above provisions of 36 Vict. ch. 39 so incorporated into the Municipal Institutions Act of the same year, 36 Vict. ch. 48, with certain alterations and additions from time to time subsequently made, have been retained in the several sections relating to drainage works, inserted in the several Municipal Institutions Acts passed from thence until the year 1894, when the Drainage Act of 1894, 57 Vict. ch. 56, was passed, in which are consolidated all the provisions of the Municipal Institutions Act of 1892 relating to

drainage works constructed upon the local improvement principle, namely, that the cost of the construction and of the repair and maintenance thereof should be chargeable and charged wholly upon the lands benefited thereby and the owners of such lands. Although the point now immediately under consideration relates solely to the liability of lands of the appellants, situate in the township of Romney, to contribute to payment of the cost of works which by the by-law of Tilbury West (which the by-law 601 of Romney is passed to give effect unto) were proposed to be executed chiefly within the township of Tilbury North, and the residue within the township of Tilbury West, still as the contention of the respondents is that the fundamental principle of the statutes relating to works of local improvement (which these clauses affecting drainage works are) has been wholly subverted by 57 Vict. ch. 56, I shall take occasion to refer briefly to the main provisions of that statute before dwelling upon those which bear specially upon the question raised in this appeal, which is as to the jurisdiction of the council of Tilbury West to charge the lands of the appellants situate in the township of Romney for the cost of the works as proposed to be executed under the by-law of Tilbury West, which the by-law 601 of Romney was passed to give effect unto.

By sec. 3, sub.-sec. 1, the petition for the construction of any drain, or the deepening, widening, clearing of obstructions or otherwise improving any stream, creek or watercourse, &c., &c., must be in the form formerly prescribed, and in it must be described, as formerly, the area proposed to be drained by the particular species of work mentioned in the petition, and it is the area so proposed to be drained, or the stream or watercourse proposed to be deepened, straightened, widened, cleared of obstructions, or otherwise improved according to the prayer of the petition that the engineer is authorised to make an examination of "and to prepare a report, plans, specifications and estimates of the drainage work, and to make an assessment of the lands and roads within said area to be benefited, and of any other lands and roads liable to be assessed as hereinafter provided,

stating, as nearly as may be, in his opinion, the proportion of the cost of the work to be paid by every road and lot or portion of lot, for benefit and for outlet and relief from injuring liability as hereinafter defined."

Then sub-sec. 2 enacts that the provisions of the preceding sub-section shall apply in every case where the drainage work can only be effectually executed by embanking, pumping or other mechanical operations, but in every such case the municipal council shall not proceed except upon the petition of at least two-thirds of the owners of lands within the area described according to said sub-section.

Then the definition of the term "injuring liability" as used in the Act is given in sub-sec. 3:

"If from the lands or roads of any municipality, company or individual, water is by any means caused to flow upon and injure the lands and roads of any other municipality, company or individual, the lands and roads from which the water is so caused to flow may under all the formalities and powers contained herein, except the petition, be assessed and charged for the construction and maintenance of the drainage work required for relieving the injured lands or roads from such water, and to the extent of the cost of the work necessary for their relief, as may be determined by the engineer or surveyor, Court of Revision, County Judge, or Referee, and such assessment may be termed 'injuring liability.'"

Then the definition of the term "outlet liability," as used in the Act, is given in sub-sec. 4.

"The lands and roads of any municipality, company or individual using any drainage work as an outlet, or for which when the work is constructed an improved outlet is thereby provided either directly or through the medium of any other drainage work or of a swale, ravine, creek or watercourse, may, under all the formalities and powers contained herein, except the petition, be assessed and charged for the construction and maintenance of the drainage work so used as an outlet, or providing an improved outlet, and to the extent of the cost of the work necessary for any such outlet as may be



determined by the engineer or surveyor, Court of Revision, County Judge or Referee, and such assessment may be termed 'outlet liability.' "

Then precise directions for determining in every case what lands shall be chargeable with "injuring liability," and also with "outlet liability," as those terms are used in the Act, and how the amounts chargeable to each lot in respect of each of those liabilities shall be determined is given in sub-sec. 5 of this third section.

"Sub-section 5: The assessment for injuring liability and outlet liability provided for in the two next preceding sub-sections shall be based upon the volume, and shall also have regard to the speed of the water artificially caused to flow upon the injured lands, or into the drainage work from the lands and roads liable for such assessment."

Then by sec. 57, provision is made for the assessment of lands "benefited" by any drainage work, as this term "benefited" had always been used in all previous statutes relating to drainage works constructed under municipal by-laws, in precisely the same circumstances in which "lands using any drainage works as an outlet" are authorised to be assessed by sec. 3, sub-secs. 3 and 4.

"Sec. 57. Where any drainage work is not continued into any other than the initiating municipality, any lands or roads in the initiating municipality or in any other municipality, or roads between two or more municipalities which will in the opinion of the engineer or surveyor be benefited by such work, or furnished with an improved outlet, or relieved from liability for causing water to flow upon and injure lands or roads, may be assessed for such proportion of the cost of the work as to the engineer or surveyor seems just."

Then the Act prescribed that in the by-law "shall be" set out "the purport of the petition describing generally the lands and roads to be benefited."

Now, whatever may have been the reason (for none appears in the statute) for this alteration in the language of the provisions contained in the third section which, read literally, purports to authorize the engineer to make an assess-

ment not only on the lands and roads to be benefited within the area of the proposed work, but also of "any other lands and roads liable to be assessed as hereinafter provided," I find an insuperable difficulty in construing them as having the intent and effect contended for by the respondents, namely, of abrogating the fundamental, essential principle upon which rest these clauses in the Municipal Institutions Acts for constructing local works for the improvement of particular lands at the cost of the owners of the lands which are benefited thereby, expressed in the maxim *qui sentit commodum sentire debet et onus*, and substituting therefor a provision which subjects persons who derive no benefit whatever from the work to contribute to the payment of its costs. There is nothing new in the substantial elements of the ideas expressed by the terms "injuring liability," and "outlet liability." These were matters which had always to be taken into consideration as part of the cost of the work to be constructed under all previous municipal by-laws passed for the construction of drainage works. As to "injuring liability" under a clause in the Municipal Institutions Act which subjected all persons whose lands were benefited by the proposed work to assessment to bear and pay for (as part of the cost of the work) any damage done in the construction of or consequent upon the construction of the work, and if a sufficient sum was not included in the assessment (of the lands benefited), for the cost of construction to compensate for all damages subsequently appearing to have been occasioned as consequential upon the construction, relief for such damage (how great soever it might be) could be obtained by, and only by, an award made under the provisions of the Acts in that behalf, though the damage occasioned could not have been foreseen, and became developed only many years after the construction of the works to which the damage was attributed, and arose directly by reason of non-repair of the works. This appears to be the effect of the judgment of the Privy Council in *Williams vs. Corporation of Raleigh* (1).

It can scarcely be contended that the Legislature had any intention, in passing 57 Vict. ch. 56, to exempt the owners

of land benefited by a drainage work constructed under the Act from injuring liability of this nature, and yet the Act in its terms only authorizes an assessment to be made for "injuring liability," when the injury and its cause are apparent and are of the precise nature of that described in sec. 3, sub-sec. 3; and surely there cannot be entertained a doubt that, if water, which (to use the language of the sub-section) had been caused to flow from any lands, the property of one person, upon other lands so as to injure such other lands, is so cut off and carried away by any drainage work constructed under sec. 3 as to relieve the injured lands from the injury so caused, and to relieve the owners of the land from which the waters so flowed from liability, that constitutes undoubtedly a most material benefit conferred by the said drainage work upon the owner of the land from which the water was so caused to flow, for which his land so benefited is justly chargeable in the mode prescribed in the Act in its definition of "injuring liability," with an assessment for the benefit so conferred. The Act, however, in some degree sets a limit to the arbitrary discretion of the engineer or land surveyor in determining the amount chargeable for such benefit by prescribing that the amount to be charged shall be based upon a calculation of the volume in which, and the speed at which, the water is artificially caused to flow from the lands, from which they do flow to and upon the injured lands, or into the drainage work which cut this water off.

This provision seems to be calculated, if not intended, to afford some protection to the parties assessed against the uncontrolled discretion of the engineer or land surveyor initiating the scheme of drainage work, first, by providing that before any authority is vested in the engineer or land surveyor to make any assessment for "injuring liability," there must, in each particular case, be a "*corpus delicti*," so to speak, that is to say, there must be apparent water which is caused to flow by an artificial channel from the lands to be assessed into the drainage work, or upon other lands to their injury, which water is to be carried off by the proposed drainage work, and each assessment must be made upon the

circumstances of each particular case upon the basis prescribed in the sub-section 5; and secondly, as supplying some mode, though not a very perfect one, of testing the value of the calculations as made by the engineer.

That this is well calculated to be of some benefit to the parties assessed is apparent from the present case, in which the engineer (apparently in the mere exercise of an uncontrolled discretion) has assessed all of the lands of the appellants in Romney at 30 cents per acre for injuring liability, whereas another engineer, one of the respondent's own witnesses, of upwards of twenty years' practice of his profession in the immediate neighbourhood of the lands in question, said that he could not see any foundation whatever for any charge for "injuring liability," and, in point of fact, not a single case appeared of any injury whatever of the nature of that which is defined in the Act as "injuring liability;" no case whatever of water caused to flow artificially from any lands into the Romney drains having their outlet as aforesaid in said East Branch Stream, or indeed into any drainage work or upon any lands.

Then, as to "outlet liability," nothing can be more mistaken than the idea that an assessment by way of enforcing contribution to the payment of the cost of a drainage work constructed under the provisions of the Act, can, under the term "outlet liability," be made upon lands not benefited by the work. The idea of "outlet liability" apart from benefit is inconceivable; but the language of the Act upon this subject is, I think, sufficiently clear, upon the question when, and when only, an assessment may be made for "outlet liability." Section 59 enacts, as had been enacted by all the drainage work clauses in the several Municipal Institutions Acts from time to time in force, that a drainage work commenced in one municipality "may be continued into another municipality until a sufficient outlet is reached," and this term, "sufficient outlet" is, by the interpretation section of the present Act, defined to mean "the safe discharge of water at a point where it will do no injury to lands or roads." In

every such case the engineer may assess all lands and roads to be "affected by benefit, outlet or relief."

Then the Act in sufficiently plain terms defines what it means by this term "outlet," and prescribes the only occasion when liability to assessment for "outlet liability" shall arise.

"Sec. 3, sub-sec. 4. The lands and roads of any municipality, company, or individual using any drainage work as an outlet or for which, when the work is constructed, an improved outlet is thereby provided, . . . may . . . be assessed and charged for the construction and maintenance of the drainage work so used as an outlet," but only "to the extent of the cost of the work necessary for any such outlet." Then in sub-sec. 5, is enacted the mode by which the amount to be charged to each particular lot to be assessed is to be determined.

A careful consideration of the Act, therefore, condemns, in my judgment, as wholly inadmissible, a construction which should hold that lands not benefited by a drainage work constructed under the provisions of the Act are, nevertheless, made liable to assessment for "injuring liability" or "outlet liability," notwithstanding the words in the third section purporting to authorize the engineer "to make an assessment of the lands and roads within said area to be benefited and of any other lands and roads liable to assessment as hereinafter provided."

The provisions coming under the terms "as hereinafter provided" seem, I think, to favour rather the construction that what the Legislature intended was, to provide, in the interest of the persons to be assessed, that the sums to be assessed upon all lands benefited by the work should shew the nature of each item charged separately as follows: 1. For "benefit," meaning, I apprehend thereby (for no definition is given of this word in the Act), the benefit conferred by the facility for the drainage of all lands within the area of the drainage work, which benefit would vary according to the difference of elevation of the respective lots—the quantity of water to be drained from each—the distance of the several lots from the drainage work—and the like. 2. For "injuring

liability," i.e., for the special charge to each lot from which water is caused to flow to the injury of other lands in the manner described in the Act under the definition of "injuring liability"; the whole of the cost of this work in so far as it relates to the removal of this water is to be borne specially by an assessment upon the lot from which the water doing the injury is so caused to flow. 3. For "outlet liability"—which is only authorized to be assessed for in the one particular case of a drain constructed in one township being continued into another until a "sufficient outlet" for the waters coming down such drain is reached.

The application of the same precise mode for determining the amounts chargeable for "injuring liability" and for "outlet liability" does not appear to be, I think, quite felicitous. The just mode of applying that sub-section to "outlet liability" would seem to be: first, to determine the total amount chargeable for "outlet liability" by a calculation based upon the volume in which and the speed at which this water comes down the drain to its outlet in another municipality than that in which the drain is initiated; and secondly, to apportion that sum among the several lots from which the water is caused to flow by artificial means from the lands assessable into the drains upon a calculation based upon the volume in which and the speed at which such waters are respectively so caused to flow into the drain. In any case all lands from which no water is so caused to flow into a drain having its outlet in another municipality than that in which the drain was initiated, would be exempt from assessment, and this is the condition of all of the lands of the appellants in Romney assessed for "outlet liability" in the present case.

Two sections still remain, to which alone it seems to be necessary to refer, viz., sections 70 and 75, upon the latter of which the main contention of the respondents has been rested.

Section 70 is the only section of the Act which in terms is made applicable to a work constructed under the Ontario Drainage Act, 36 Vict. ch. 38. The section simply enacts that the same provisions as to the repair and maintenance of

a work constructed under the Ontario Drainage Act, and initiated in one municipality but continued into another to a "sufficient outlet," there reached, as in section 69, are made applicable in similar circumstances in the case of a work constructed under a municipal by-law. The provisions of section 70 had their origin in the Municipal Amendment Act, 48 Vict. ch. 39, sec. 26, which made the sections of the Municipal Institutions Act of 1883, 46 Vict. ch. 18, as to the maintenance and repair of a work initiated in one municipality and continued into another until an outlet is reached, and constructed under a municipal by-law, applicable to the case of a work initiated in one municipality and in like circumstances continued into another, and constructed under the Ontario Drainage Act. The utility of this enactment is not apparent, for precisely similar provisions as those contained in the Municipal Acts in relation to works constructed under municipal by-laws, were contained in the Ontario Drainage Act, 36 Vict. ch. 38, in relation to like works constructed under that Act; and as an award was made in 1878, under the provisions of that statute, which determined the extent of the liability of lands in Romney for the construction, maintenance and repair of the work executed by the Ontario Government in the East Branch Stream at the point where the Romney drains continued into the township of Tilbury West reached their sufficient outlet, the necessity of section 70 is not apparent.

However, this is by the way at present, for we are not now dealing with a by-law passed for maintenance and repair of the work for which the lands in Romney were assessed in 1878, and done by the Ontario Government in the outlet of the Romney drains. When the question of the liability of lands in Romney to contribute to the cost of repair and maintenance of that work shall arise, it will be time enough to consider whether they can be rated for the cost of maintenance and repair in any greater proportion than that in which they were, by the award of 1878, rated for the cost of construction.

However, the language of this section 70 has, I think, some considerable bearing upon the construction of section

75, upon which the respondents so much rely. The Legislature, by the language used in section 70, seems to shew a plain intention of limiting the application of the Act to works constructed under the Ontario Drainage Act, to the provisions of that section, namely, to cases of repair and maintenance alone.

Then it is enacted by section 75 that wherever it shall be deemed expedient to change the course of any "drainage work" "constructed under the provisions of this Act or any Act respecting drainage by local assessment, . . . or to make a new outlet for the whole or any part of the work, or otherwise improve, extend or alter the work, or to cover the whole or any part of it, the council of the municipality or any of the municipalities whose duty it is to maintain the said drainage work may, without the petition required by sec. 3 of this Act, but on the report of an engineer, . . . undertake and complete the change of course, new outlet, improvement, extension, alteration or covering specified in the report, and the engineer or surveyor shall, for such change of course, new outlet, improvement, extension, alteration or covering, have all the powers to assess and charge lands and roads in any way liable to assessment under this Act for the expense thereof in the same manner and to the same extent . . . as are provided with regard to any drainage work constructed under the provisions of this act."

Now, while the language of this section is most apt when construed as applying only to a "drain," that is a wholly artificial work having a course capable of being altered, extended and improved, and having an "outlet" for which a new outlet is capable of being substituted, the language appears to be quite inapt to be applied to a work such as that done by the Ontario Government in Big Creek in 1878, terminating at the line between the third and fourth concessions of Tilbury West, which work consisted merely in the straightening and deepening the natural stream by dredging. Work of that character so terminating and done wholly in the bed of the running stream cannot be said to have there an outlet



capable of being altered and to have another substituted therefor. The stream in which the work of dredging was done, flowed on in its natural course to its outlet (but that is quite a different thing), about seven miles further down, but the work done in that stream, which consisted of deepening by dredging, and straightening, could not be said to have an outlet, to which section 75 could apply.

Then, again, this section 75 is enacted in lieu of section 585 of the Consolidated Municipal Act of 1892, which is repealed by section 114 of 57 Vict. c. 56. Now that section 585 so repealed was a clause in consolidation of section 585 of the Municipal Act, ch. 184, R. S. O. of 1887, which again was in consolidation of section 586 of the Municipal Institutions Act of 1883, [46 Vict. ch. 18] which again was but in consolidation of section 17 of 45 Vict. ch. 26, an Act intituled "An Act to make further provision for the Construction of Drainage Works by Municipalities," where the clause originated, and in each of these sections the word "drain" was used in every place where the words "drainage works" or "work" (simply) occur in this section 75, so that the fair and reasonable construction of this section, I think, is that the words "drainage work" and "work," as used in it, mean precisely the same thing as the word "drain" as used in section 585 of the Act of 1892, and in all the other sections of the above mentioned Acts of which that section was but a consolidation, and nothing more. When, then, we find the Legislature in section 70 applying in express terms the provisions of that section (as to repair and maintenance) to a work constructed under the "Ontario Drainage Act," and in section 75 re-enacting all the provisions of the repealed section 585 of the Consolidated Municipal Act of 1892, except the words comprehending "a work constructed under the Ontario Drainage Act," the natural and reasonable conclusion would seem to be that the section could not be construed to have any application to such a work, and if all works constructed under the Ontario Drainage Act were of the character of the works appearing in this case as having been executed by the Ontario Government in 1878, with the exception

of the drains 1, 2, 3 and 4 of Mr. Holwell's survey, the omission of those words of section 585 from this section 75 would appear to have been most wise, because of the inaptitude of the words used in the section to works of the character of those done in the beds of Big Creek and of Tremblay Creek, and of the East and West Branches by the Ontario Government in 1878.

The language used in the section is apt enough to include works of the nature of the "drains Nos. 1, 2, 3 and 4 of Mr. Holwell's survey," if the words of the repealed section 585, comprehending works "constructed under the Ontario Drainage Act" had been re-enacted, but quite inapt by way of application to a work of straightening a running stream, or of deepening it by dredging. The effect of the omission of the above words from section 75 would seem to be, to exclude even the "drains Nos. 1, 2, 3, and 4 of Mr. Holwell's survey" from the operation of the section, which works, if the omitted words had been re-enacted, would have been within it; but, assuming the words in the section, "any drainage work constructed under the provisions of this Act or any Act respecting drainage by local assessment" to be sufficient, by reason of these latter words, notwithstanding the omission of the omitted words, to include a work constructed under the Ontario Drainage Act, such work must be one constructed, that is to say, as it appears to me, must be an artificial drain, just such as is mentioned in section 585 of the Act of 1892, and in all the previous Acts above mentioned since, and inclusive of 45 Vict. ch. 26. The reasonable and natural construction of the section, by reason of the omission of the omitted words of section 585, appears to me to be that section 75, like all the other sections, except 70, applies only to case of drainage works constructed, that is, to artificial drains constructed, under municipal by-laws, and the exception made that the works contemplated by the section to be undertaken and completed by the council of the municipality whose duty it is to maintain such work "without the petition" required by section 3 of this Act, seems to me to afford corroboration of that view. Why without such petition? Why

should a work of the character referred to in the section, to be paid for by special local assessments under section 3, be constructed without the petition required in section 3, when such a projected work could not be entertained by a municipal council without such petition? The Legislature must have had some reason for this distinction, and the only one which presents itself would seem to be, that, in the case of a drainage work constructed under a municipal by-law which only could be undertaken and constructed originally under such a petition as is provided in section 3, it was thought that power might be given to a municipal council which had authorized the construction of the work originally, or which had imposed upon it the duty to maintain such a work, to change the course of such work, or to make a new outlet for it, etc., etc., as mentioned in the section, without the necessity of any further petition.

The by-law No. 45 of Tilbury West was, as we have seen, expressed to be passed "to provide for extending and otherwise improving Big Creek, in the townships of Tilbury North and Tilbury West."

In point of fact, no such project was or could have been in contemplation; it would have been practically impossible. That the council of Tilbury West, under R. S. O. of 1887, ch. 184, s. 479, s.-s. 15, which was the section in 1897 in force in consolidation of 36 Vict. ch. 48, s. 372, s.-s. 10, above extracted, had power to widen, alter the course of, or even to extend (if that were possible) Big Creek, may be admitted, but such work performed under that section must needs have been performed at the charge of the general funds of the municipality. That such was not the intention of the council of Tilbury West can confidently be asserted. The council of Tilbury North appears to have entertained the idea that (under the provisions of section 7 of 54 Vict. ch. 81, which was "An Act passed for the purpose of dividing Tilbury West into two townships, Tilbury North and Tilbury West") the council of Tilbury West had power, which the council of Tilbury North had not, to initiate and complete under the provisions of section 75 of 57 Vict. ch. 56, a work of a purely

local character by the construction of which the council of Tilbury North and the owners of certain lands therein situate would alone be benefited; the procuring the construction of which work, unless it could be so procured to be undertaken, was hopeless. It appears incontestable, upon the evidence, that this by-law 45 of Tilbury West was passed, and the works therein mentioned were undertaken, by the council of Tilbury West, at the earnest instance and pressing solicitation of the council of Tilbury North. It is true that at the trial it was said that some individuals had made some applications by letter to the council of Tilbury West, but the nature of those applications did not appear, for upon counsel for the appellants insisting that they should not be spoken of unless produced, the defendants in the action refused to produce them, and so the case was left to stand upon the evidence, which was unequivocal, that the engineer was employed to make a report, but upon what particular matter did not appear, and that upon his report the by-law was passed and the work therein mentioned was undertaken at the special instance of the council of Tilbury North. This is an incontestable fact established by the evidence, whatever may be the effect of the established fact. Whether the municipality of Tilbury West fulfil the condition precedent necessary to give them the right to act in the circumstances of the present case under section 75 of 57 Vict. ch. 56, may perhaps be open to some doubt, that is to say, whether the municipality had a duty imposed upon it to maintain the drainage works which, done by the Ontario Government in 1878, at the cost wholly, both as to construction and maintenance, of the owners of lands particularly benefited thereby, may perhaps be open to question. But no such point was made in the argument before us, and I do not think that it is necessary that it should be decided on this appeal.

Now, by the Act 54 Vict. ch. 81, Tilbury North was made to consist of "all that portion of the former township of Tilbury West which lies north of the centre of the road allowance between the ninth and tenth concessions, and east of the line between lots 15 and 16, and north of the centre of the road

allowance between the range of lots north of the middle road and fourth concession, and north of the centre of the road allowance between the fourth and fifth concessions of said township of Tilbury West."

By this description the whole of the land lying between Lake St. Clair, the extreme northern boundary of the township, and the line between the fourth and fifth concessions, was situate in Tilbury North, and Big Creek proper also, which extended from the Forks to its mouth at the River Thames, with the exception of about three-quarters of a mile measured from the Forks, was in Tilbury North. The only apparent interest which the council of Tilbury North had which could explain their earnest solicitation of the council of Tilbury West, to pass the by-law, and undertake the work therein mentioned, consisted in this, that all the lands in Tilbury North lying north of the line between the third and fourth concessions are low, wet, marsh lands called "The Plains," no part of which is anywhere more than three feet above the ordinary level of the Lake St. Clair. The waters of this lake rise gradually and periodically (and sometimes to a very great height), and again in like manner subside and rise again in such a manner that this rising and subsiding of the waters is in common language (although inaccurately) spoken of as a tide. The broken front concession and the three adjoining concessions have always in every year been overflowed more or less by this rising of the waters of the lake, and in some years so as to leave only a mound of earth here and there visible. The ordinary level of Big Creek at a place called The Narrows in the centre of the third concession, and thence to its mouth, a distance of over three miles, is the same as the ordinary level of the lake. These low, wet, marsh lands, besides being exposed to being overflowed and drowned from this cause, are also, in all times of freshets, exposed every year to further overflow from the waters of the River Thames, a large navigable river rushing down with great force and in large volume directly opposite to the mouth of Big Creek, thereby forcing the waters of the

Thames up the Big Creek and up a large stream called Baptiste Creek, and up Tremblay Creek, and up another stream called Bruley Creek, which three latter streams flow into Big Creek as it flows through those low, wet lands, called "The Plains," and so also the waters flowing down all of those streams are penned back and made to spread over "The Plains," where, uniting with the waters of the lake, so as aforesaid, overflowing the Plains, the combined waters keep the Plains continually flooded to a greater or less height, until the waters of the lake subside and the force of the freshets have ceased. There is not, nor does there appear to have been supposed to be any possible mode of draining those lands either into Big Creek or otherwise, and there is said to be no possible mode of reclaiming them except by embankments made so as to enclose the parts to be reclaimed, and thus keep out the flood waters.

Within the last ten years many pieces of those lands have been reclaimed in this manner in Tilbury East, along Baptiste Creek. Pumping has been used in some cases to get the water out of the parts enclosed by the embankments, but this is not essentially necessary. Since the Grand Trunk Railway and the Canadian Pacific Railway have been constructed across these "Plains," the former in the broken front concession, and the latter in the second concession, their embankments, which it has been necessary to construct to a height sufficient to enable the railway tracks to be laid above the flood waters, have served to be used as embankments in this reclaiming process. This is the unquestioned evidence as given by engineers who have been familiar with the condition of these "Plains" for very many years. Mr. McDonell, an engineer, who designed some of the works completed by the Ontario Government in 1878, says that these embankments, together with the embankments constructed in the present scheme, would afford perfect means of reclaiming all the lands in the Plains if the railway companies would close the many passages kept open under the railways by which the flood waters pass up from the lake on to the

"Plains," and back again when the lake subsides. He suggested this to the Grand Trunk Railway Company some years ago, but that company refused to concur in his suggestion through apprehension, as it would seem, that if the flood waters from the lake were prevented from passing under the railway, their force might destroy the railway embankment. A Mr. Holland has reclaimed a farm upon lot 16, in the first concession, about one and a half miles west of Big Creek. He used the process of pumping to clear the water from his enclosure, but that is not requisite in all cases. A Mr. Morris has reclaimed a farm in the third concession about half a mile east of Little Creek, and over a mile west of Big Creek. He has not made use of the pumping process, but has availed himself of a railway embankment upon one side of his enclosure.

Now, the work designed by the said by-law No. 45 of Tilbury West to be done here, as appears by the engineer's report, which was made part of the by-law, was of the following description, namely:

That embankments should be made on each side of Big Creek proper, from the Canada Southern Railway, that is to say, from where it crosses the line between the fourth and fifth concessions to the Grand Trunk Railway, which crosses Big Creek about half a mile from its mouth, a distance of over six miles, and like embankments along Tremblay Creek from its junction with Big Creek on lot 19, in the first concession, to where the Canadian Pacific Railway crosses Tremblay Creek on lot 20, in the fourth concession. These embankments were to be made according to plans and specifications referred to in the report which was made part of the by-law, and were to be of prescribed dimensions in height and width and of sufficient strength to prevent the waters of these two streams, Big Creek and Tremblay Creek, expanding over these low, wet lands called The Plains, of which, as the report says, there are 4,500 acres in Tilbury North, which, as the report also says, will be greatly benefited by the embankments which were designed to prevent the overflow of water upon them from Big Creek and Tremblay Creek. That these

lands would not only be greatly benefited, but that they would be the only lands deriving any benefit from this work, which was designed to be constructed at a cost of \$31,000, is the only conclusion reasonably to be deduced from the evidence. Now such a work, constructed along Big Creek and its affluent, Tremblay Creek, where the ordinary level of these streams is the same as the level of Lake St. Clair, cannot, in my opinion, be said with any propriety to be a drainage work at all, or to be in any respect connected with the work done in Big Creek proper in 1878 between the Forks and the line between the third and fourth concessions, at a cost, as already stated, of \$5,983.32, nor can it be said, in my opinion, to come within the provisions of section 75 of 57 Vict. ch. 56. The work so designed at a cost of \$31,000 is nothing but a scheme for reclamation of drowned lands situate in such a low position as to be incapable of being drained, a work, in fact, of a character that has been in much use as a reclamation scheme on these plains within the last ten years, since the railway embankments were made across the plains. There is no novelty in the scheme, save only in attributing to it the character of a drainage work; that it does not come within the scope and intent of the section 75 appears to me to be clear for the reasons already given, and that it does not appear to be concluded by sub-section 2 of section 3 of 57 Vict. ch. 56. It is said that the embankments under consideration here are not such embankments as that sub-section refers to, but no reason is suggested that I can see in support of such a contention. It is perfectly obvious that without the embankments the purpose for which they were designed, namely, of preventing the waters in the streams expanding over those low lands, could not be obtained. If the work can be considered to be a drainage work at all the embankments are essentially necessary to such work.

Then the by-law wholly ignores the condition of the lands in Romney, and the clauses of the Act in virtue of which the council of Tilbury West claims to have jurisdiction to affect those lands.



The lands in Romney are subject to whatever obligation has been imposed upon them, by 36 Vict. ch. 38, and the award made thereunder in 1878, to maintain in repair the work done by the Ontario Government on the outlet of the drains in Romney into the natural watercourse of the East Branch stream, that is to say, at a point where the Romney drains reached a sufficient fall to prevent injury to lands and roads. Whatever may be the extent of this obligation, the lands in Romney assessed in 1878 by the award then made are subject to it; but that obligation gives no jurisdiction whatever to the council of any of the townships through which Big Creek flows to charge lands in Romney for contribution to the cost of every work any one or more of such townships might undertake to construct any where along the course of Big Creek from its source in the township of Mersea to its mouth, a distance of eighteen or twenty miles. The obligation to maintain the work at the outlet of the Romney drains for which the lands in Romney were assessed by the award in 1878 can, I apprehend, be enforced against the council of Romney, and the owners of such lands, by any persons claiming to suffer injury by neglect to repair and maintain. Whether the council of Tilbury West has jurisdiction *suo motu*, to determine when the work has fallen into such a condition as to require repair and to enforce the obligation upon the lands in Romney, cannot be judicially determined until such jurisdiction shall be asserted. It is sufficient at present to say that this is not a case of that description. When the case shall arise it will be time enough to determine what is the extent of the liability of the lands in Romney in view of the award made in 1878 under the provisions of 36 Vict. ch. 38.

The engineer who made the report which is made part of the by-law has said in his evidence that the charges for "injuring liability" and "outlet liability" which he has made upon the lands in Romney, were made upon the principle of preventing injury to the low, wet lands above referred to; this was the only explanation he could, or at least did, offer for making those charges. He was asked to explain upon what principle he had proceeded in charging the lands in

Romney thirty cents per acre as for "outlet liability." To this inquiry he could not, or at least, did not, give an answer save as above. It is not strange then, I think, that two engineers of considerable experience, one called as a witness for the plaintiff, and the other for the defendant in the action, Mr. McGeorge and Mr. Laird, should have said in their evidence that they could not see any ground whatever for any charge for "injuring liability" in the present case. Referring to the definition of those terms, "injuring liability" and "outlet liability" as given in the Act, and to the only obligation to which the lands in Romney were made liable by 36 Vict. ch. 38, and the award thereunder, the council of Tilbury West had, I think, no more jurisdiction to charge lands in Romney for the work mentioned in the by-law, either for "benefit," or "injuring liability," or "outlet liability," than they had to charge lands in the township of Dover at the opposite side of the River Thames.

For the reasons above given, I am of opinion that the appeal, in so far as it relates to the by-law 601 of Romney, must be allowed with costs, and that judgment in the action must be ordered to be entered for the plaintiff with costs in so far as relates to the said by-law 601. The form of the judgment (being limited as was the action to the interests of the plaintiff, the now appellant), should be to the following effect:

Declare that the council of the municipality of Tilbury West had no jurisdiction to attempt to impose any charge, as they have assumed to do by the by-law 45, upon the lands in the pleadings mentioned, the property now of the appellant, viz., lots Nos. 21, 22 and 23 in the 5th concession, the south half of lot 21, lots 22, 23 and 26 in the 4th concession, and the north half, and the west half of the south half of lot 21, and the north half of lot 22, and the north half and the west half of the south half of lot 23 in the 3rd concession of the township of Romney, in the county of Kent.

Restrain the council of the township of Romney from taking any steps or proceedings to enforce the by law No. 601 of the township of Romney against the said lands:

Declare that the registration of the said by-law is ineffectual and void, and has imposed no lien upon the said lands in respect of the assessments in the said by-law assumed to be imposed.

AS TO BY-LAW NO. 602.

There can be no doubt that the Council of the township of Romney had jurisdiction to pass this by-law. It is nothing but a by-law to repair and maintain a drain constructed under the provisions of 36 Vict. ch. 39. Whether or not there has been any miscarriage in the proceedings taken under the provisions of the statute as regards such a by-law is not a matter open to inquiry in this action.

In so far, therefore, as relates to by-law No. 602, the appeal must be dismissed, but as the main, and indeed almost the whole contention in the appeal related to the by-law No. 601, and the costs of the appeal do not appear to have been increased by the contention as to the by-law No. 602, the appeal, in so far as it relates to that by-law, is dismissed without costs.

Appeal allowed with costs as to by-law 601; dismissed without costs as to by-law 602.

Geo. B. Douglas, solicitor for the appellant.

Rankin & Scullard, solicitors for the respondent.

## IN THE HIGH COURT OF JUSTICE.

## FAIRBAIRN VS. SANDWICH SOUTH.

*Division of Township—55 Vict. (Ont.) ch. 85, Liability of Newly Created Township for Repair—Notice—Mandamus—Bridges.*

Upon the division of a township by statute, 55 Vict. (Ont.) ch. 85, into two separate townships, the duty of maintaining and keeping in repair a drain constructed by the original township devolved upon the newly created township in which the drainage work is situated, and such township became liable for all the consequences of its neglect to keep the drain in repair.

In the absence of the written notice required by sec. 73 of the Municipal Drainage Act, a mandamus will not be granted.

Where an engineer in his report neglects or omits to provide for the construction or enlargement of bridges rendered necessary to afford access from the lands of owners to the travelled portion of the public highway as required by sec. 9 (1) of the Municipal Drainage Act, no right of action is conferred on the person injured by such neglect or refusal, nor does the statute confer a right of appeal to the Court of Revision or to the Referee, but it does not follow that in an appropriate proceeding and on it clearly appearing that the judgment of the engineer was either *mala fide* or erroneous, the Court would not review the exercise by the engineer of the power in this regard conferred on him by the Act.

The action and all questions arising therein were referred by order to the Drainage Referee.

The facts of the case sufficiently appear in the judgment of Lister, J.A.

J. B. Rankin and M. Sheppard appeared as counsel for plaintiffs, and Matthew Wilson, Q.C., and A. H. Clarke as counsel for defendant.

September 12th, 1898. Thomas Hodgins, Q.C., Referee.

Where there are direct pecuniary responsibilities attaching to the commission of illegal acts, it is proper for a Court or jury to consider whether the plaintiff claiming damages for such illegal acts is free from what the law defines to be contributory negligence, or whether by using reasonable precaution he could have reduced the effect of the damage complained of. For it is only reasonable that where an injured

party has it in his power to take measures to mitigate or to prevent the recurrence of the injury, so that his loss may be less aggravated, it is his duty to do so; and this has been illustrated in some cases where the question of liability was affected by the consideration of what has been the remote, or the proximate and immediate, cause of the wrong or damage complained of.

The plaintiffs claim that in 1892 more of their lands were drowned than in former years, occasionally owing to some driftwood and timber having fallen into the drain just near the bridge, and having moved through it and stopped in the drain on their land by the base line bridge, by reason of which their lands were submerged and their crops damaged. One plaintiff stated in answer to my question: "Could you not have taken them out in a day?" reply, "Oh, yes, I think so," and on his saying that it was a curious thing if the public paid a man to look after the public interest and he didn't do it, I asked: "Can you tell me why you and your son did not take them out, and thereby save your own land?" he replied, "Well, to tell you the truth of the matter, I don't know why I did not do it. I understood it was the Commissioner's duty."

The law on this point has been thus illustrated: "Suppose a man should enter his neighbour's field unlawfully, and leave the gate open. If before the owner knows of it cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and wilfully or through gross negligence leaves it open all summer, and cattle get in and destroy the crops, it is his own folly." *Toker vs. Damon* (1).

The evidence satisfies me that the flats or swale on the plaintiff's land through which the drain is constructed have, owing to their natural formation, been subject for years past to flooding during heavy rains and freshets.

And, further, it has been proved that it is not good farming to plow and cultivate flats which are thus constantly liable to flooding, as the forceful rush of the flooding water

over plowed land usually carries off the surface earth when loosened by the plow.

The engineer, Mr. Halford, says: "On portions of the plaintiff's land the water will be all the year around except in dry seasons;" and referring to the drains, he stated that "the drains are sufficient for the high lands, but not for the low lands or valleys in these localities," but that "it is not practicable in wet years like 1896 and 1897 to make a drain to carry off the water;" and that therefore the plaintiff's lands are doomed every year when there is high water. He also says that the plaintiff's lands have been relieved to a certain extent, but not entirely; and that the damage they suffer, as mentioned in his report, has been caused by natural and not by artificial means.

Taking these facts and the other evidence in this case into consideration, I cannot find that the loss sustained by these plaintiffs has been caused by such negligence of the defendant municipality as would make them liable in damages to the plaintiffs, and must therefore dismiss the action with costs.

Judgment of the Court of Appeal for Ontario on appeal by the plaintiff from the judgment of the Drainage Referee.

The appeal was argued before Burton, C.J.O., Osler, MacLennan, Moss, and Lister, J.J.A., on the 29th and 30th days of March, 1899.

J. B. Rankin, for the appellants

Matthew Wilson, Q.C., and A. H. Clarke, for the respondent.

The judgment of the Court was delivered on the 29th of June, 1899, by

Lister, J.A.:—

The plaintiffs' claims as set forth in their statements of claim are shortly these: That the defendants neglected to discharge their statutory duty to maintain and keep in repair a drain, wholly within the boundaries of the defendant municipality and known as the West Townline and Pike Creek

Drains, by reason whereof the waters of the same overflowed and flooded the plaintiffs' lands, occasioning damage to their crops and lands;

That the defendants after undertaking and commencing the work of repair unnecessarily delayed the completion, and for that reason and on account of the way in which the work of repair was carried on and performed Pike Creek overflowed and flooded the plaintiffs' lands to their damage;

That the outlet of the drains was not sufficient or capable of carrying off the water brought into it, by reason whereof the waters of the drain flooded the plaintiffs' lands;

That the work of repair done by the defendants was wholly insufficient and not properly done, and they ask for a mandamus.

The defendants, besides denying all charges of negligence, alleged that they were under no obligation to preserve and keep in repair the drains in question; that such obligation rests upon the township of Sandwich East; and that if they are liable at all to the plaintiffs such liability is confined to acts of negligence in the performance of the works of repair voluntarily undertaken by them.

On the trial of the action before the Drainage Referee, to whom it was referred under the provisions of the Drainage Act, the plaintiffs put forward the further claims:—

That the change of the location of the drain from the west to the east side of the road was a cause of injury; that the report of the engineer did not provide for a bridge which the plaintiffs insist is necessary to afford access to the highway from their lands, and they also claimed damages consequent on the work done by the defendants.

The pleadings were not amended by the Referee so as to cover the last mentioned claims, and it does not appear that any application was made to amend them so as to include these claims, but the plaintiffs' right to recover in respect of them was discussed at bar, and evidence concerning such claims seems to have been adduced at the trial.

The liability of the defendants depends upon whether ch. 85 of 55 Vict. (O.), casts upon them the duty of maintaining and keeping in repair the drain in question.

The drain was constructed in the year 1886 by the municipal corporation of the township of Sandwich East as then constituted under the authority of what I assume was a valid by-law passed under the drainage provisions of the Municipal Act. At that time the municipality of Sandwich East embraced—and continued until the last Monday of December, 1892, to embrace—all the territory which now constitutes the two municipalities of Sandwich East and Sandwich South.

The Legislature of the Province of Ontario by sec. 1 of the Act above alluded to, carved out of the territory of Sandwich East, as it then was, the territory now comprising Sandwich South, and created the same into a municipal corporation under the name of the Municipal Corporation of the Township of Sandwich South, and thereby conferred upon it all the rights and made it subject to all the liabilities appertaining to other townships in the Province of Ontario.

That portion of the territory of the old township of Sandwich East which remained was, by sec. 2 of the same Act, created into a municipal corporation under the old name, and it in like manner had conferred upon it all the rights and privileges, and was made subject to all the liabilities appertaining to other townships in the Province of Ontario.

Section 3 provided for the adjustment of the assets and liabilities of the old township as in the case under the Municipal Act, of the separation of a junior from a senior township, and also provided for the repayment of the debts of the old township assigned to each on such adjustment as if the same had been incurred by the new municipalities respectively.

What the Act did was to extinguish the old municipality of Sandwich East and out of its territory create two new municipal corporations; and it also provided for the payment of the debts of the old corporation by the two new corporations thereby created.



The contention that that portion of the old township of Sandwich East which was not taken to form the township of Sandwich South, became a "continuing" corporation, and, therefore, remained subject to the obligation to maintain and keep in repair the drains in question, is not in my opinion tenable.

Section 5 in express terms declares that it shall be deemed to be a continuation of the township of Sandwich East for the purpose of applying the provisions of the Municipal Act relating to the adjustment of assets and debts of a union of townships to the adjustment of the assets and debts of the old organization as if there had been a union and separation of the two new municipalities.

It is, I think, quite evident that the liability mentioned in sec. 7 is an assessment liability of lands and roads for the maintenance of drainage works constructed under drainage by-laws, and which lands and roads under such by-laws are, at the time of the passing of the Act, liable to assessment for the cost of maintaining and keeping such works in repair.

But for this section it might be argued that the old township, having become distinct by reason of its whole territory having been created into two new municipalities, lands and roads which were at that time liable for the cost of preserving such works would be relieved from such liability.

This section removes any doubt that might without it have existed as to the liability of such lands and roads being continued.

Section 1 of the Act declares that the defendant corporation "shall enjoy all the rights and privileges and be subject to all the liabilities appertaining to other townships in the Province of Ontario." One of the liabilities imposed on other townships in the Province of Ontario was, and is, the duty of maintaining and keeping in repair such a drain as this.

This section, in my opinion, transfers the burthen to the new municipality of Sandwich South.

The duty having been thus imposed on the defendants, they become liable for all the consequences of this neglect to discharge it.

The notice in writing required by sec. 73, not having been given to the defendant in accordance with the provision of that section, the plaintiffs are not entitled to maintain this action for a mandamus: *Williams vs. Raleigh* (2).

Nor can they maintain it for the neglect or refusal of the defendants to provide a bridge, which they allege is necessary to afford access from their lands to the travelled portion of the highway.

The evidence as to the necessity for this bridge was conflicting. Under clause 2 of sec. 9 of the Drainage Act, the engineer is required in his report and estimates to provide for the construction or enlargement of bridges rendered necessary to afford access from the lands of owners to the travelled portion of the public highway, and to include the cost thereof in his assessment for the construction of the drainage work.

But it is to be observed that for his neglect or omission to make such provision no right of action is conferred on the person injured by such neglect or refusal.

Nor does the statute confer a right of appeal to the Court of Revision or to the Referee against the report of the engineer, as is given in respect of the matters provided for in clause 5 of sec. 9.

But notwithstanding the fact that no right of appeal is given, it does not follow that in an appropriate procedure, and on it clearly appearing that the judgment of the engineer was either *mala fide* or erroneous, the Court would not review the exercise by him of the power in this regard conferred on him by the Act.

It appears to me that in the circumstances of this case the liability of the defendants must be confined to the damages (if any) resulting from their neglect to keep the drains in repair. That at the time the by-law was passed by the defendants providing for its repair, and for some time prior thereto, it was in a state of disrepair, is, I think upon the evidence, manifest. But what damages the plaintiff sustained by reason of such disrepair is hard to determine.

The evidence shews that the lands which it is said were injured are low and swampy, and that in exceptionally dry years only can they be cultivated.

The plaintiffs abandoned their claim for damages alleged to have been sustained in the year 1892, and admitted that there was a damage in 1893, and that their crops were good in 1895.

In 1894 it was said that two acres were plowed but not cropped by reason of flooding. In the fall of 1896 four acres were plowed and cropped in the following spring with corn, which did not grow by reason, it is said, of the overflowing of the waters of the drain.

The learned Referee was of the opinion, and so found, that the damage which the plaintiffs sustained was caused by natural and not by artificial means, and that such damage was aggravated by the plaintiffs' own fault. I cannot entirely agree with the learned Referee's finding.

I think upon the evidence the plaintiffs suffered some damage by reason of the neglect of the defendants to discharge their statutory duty.

It is, I think, regrettable that costly litigation should grow out of a claim in which the damages upon the plaintiffs' own showing are but trifling.

I think the judgment of the learned Referee should be reversed, and that judgment should be entered for the plaintiffs for \$40 and costs on the Division Court scale.

The defendants are not to be allowed to set off their costs below against the plaintiffs' judgment and costs.

# UNDER THE MUNICIPAL DRAINAGE ACT.

JAMES R. RHODES VS. THE TOWNSHIP OF RALEIGH.

JOHN R. LONGMORE VS. THE TOWNSHIP OF RALEIGH.

WILLIAM LONGMORE VS. THE TOWNSHIP OF RALEIGH.

PETER FERGUSON AND R. MOORE VS. THE TOWNSHIP OF  
RALEIGH.

*Easement for Drainage—Principles of Compensation—Land Occupied  
by Channel of Drain—Land Occupied by Excavated Earth—  
Damages from Negligent and Improper Dumping of Earth—  
Fences along Drain—Bridges.*

Though the owner's estate and ownership in the soil of lands used as the channel of the drain constructed under the Municipal Drainage Act are not expropriated or vested in the municipality, the municipality on behalf of the owners of land benefited by the drain acquires a right of entry upon, and user of, and easement over, such lands substantially equal to a taking or an expropriation of the lands for the purposes of the drain, and their value should therefore be estimated and dealt with on the same basic principle of full compensation as for lands taken and expropriated for public purposes under the Municipal Act.

Measure of damages for lands occupied by channel of drain, for lands occupied by earth excavated from the drain, and for negligent and improper dumping of the excavated earth discussed.

Cost of fencing drain not allowed.

Claim for bridges not allowed where the drain formed the boundary line between the properties of the claimants.

These proceedings were commenced by notices fyled and served under the Municipal Drainage Act, claiming damages to land caused by the enlargement and construction of the Raleigh Plains Drain, and by the enlargement and construction of the Raleigh Plains Drain No. 2, in the county of Kent.

The claims were all tried together at Chatham on the 12th, 13th, 14th, 15th, and 21st days of October, 1898.

C. R. Atkinson, Q.C., appeared for the claimant Rhodes.

Wm. Douglas, Q.C., appeared for the other claimants.

Matthew Wilson, Q.C., and J. G. Kerr, appeared for the Township of Raleigh.

November 29th, 1898. Thomas Hodgins, Q.C., Referee.

In considering the damage alleged to have been done to the property of individuals in the construction of drainage works, or consequent thereon, referred to in sec. 93 of the Drainage Act, two fundamental propositions are involved: 1st, what legal injuries have been done to the property affected, and 2nd, what is the scale or measure of damages by which the money value or the compensation for such legal injuries should be ascertained or assessed.

The claims for legal injuries alleged to have been done to the properties of the respective plaintiffs in the construction of the Raleigh Plains drain may be classified as follows:

1. Cutting and excavating portions of their farms for the channel of the drain, using such channel for the drainage waters flowing from the upper drainage area.

2. Occupying other portions of their farms adjoining the drain with banks of the earth excavated from such channel.

3. Negligently excavating such excavated earth upon such adjoining portions of their lands, so that the said banks are hillocky and uneven, and thereby difficult or impossible of cultivation, and are productive of weeds.

4. Negligently omitting to fence one or both sides of the drain so as to protect the cattle of the respective plaintiffs from falling into the drain, and also to prevent straying cattle trespassing on their respective farms, or damaging their crops.

5. In some of the cases there are claims for farm bridges by reason of the severance of such farms into two parts by the drain, with averages from 50 to 75 feet in width; and in others are claims for special injuries consequent upon the construction of the drain.

Before dealing with the question of damages in each case, it will be proper to consider the legal effect of the proceedings under which the land for the channel of the drain is acquired, and the other necessary works are constructed, under the provisions of the Drainage Act.

For the purposes of the Drainage Act, the territory constituting the drainage area becomes, says Boyd, C., in *West Nissouri vs. North Dorchester*(1), "a quasi municipality" for drainage purposes, and the assessed ratepayers within such territory become (as aptly named by Hagarty, C.J.O., in *Sombra vs. Chatham*(2)), "co-adventurers," who embark on a joint adventure for the construction of a drain or artificial watercourse to drain their lands, and thus improve and make them more productive for agricultural purposes, and, as a consequence, enhance their monetary value.

Neither the land through which the proposed drain is cut, nor the soil of the channel through which the drainage waters are carried to an outlet, is expropriated by the municipality under its statutory powers; nor is the title or ownership of the land occupied by such channel or drain vested in the municipality, or in the co-adventurers for whose use and benefit such drain is constructed.

But by conferring upon the municipality on the petition of a majority of the owners of land within such drainage area statutory powers to construct a drain or artificial watercourse for the use and benefit of those who thereby become co-adventurers, such municipality on behalf of such co-adventurers acquires a substantive right of entry upon, and user of, and easement over, the lands of the parties through which the drain is constructed; a right, user, and easement, which is thereafter protected from invasion, derogation, or obstruction by such parties and their assignees, or outside parties, so long as the drainage work exists.

The rights of entry, user and easement thus acquired upon and over such lands is substantially a "taking" or an "expropriation" of a quantum of the estate and ownership of such parties in their respective lands; for it imposes on their estate and title the burden of the user of the soil occupied by the channel of the drain as a conduit for carrying the drainage water from the adjoining and upper lands, and the municipality on behalf of the co-adventurers, and for their use

(1) 14 O. R. at p. 299

(2) 18 A. R. 254.

and benefit, further acquires the right to enter upon such lands at reasonable times for the purpose of inspecting such drain, or removing obstructions, and of making necessary repairs and improvements.

Though the owner's estate and ownership in the soil of the lands so used as the channel of the drain, are not *eo nomine* expropriated or vested in the municipality, or the co-adventurers, the acquisition of these rights of entry, user and easement are, as I have said, substantially equal to a taking or an expropriation of the lands for the purposes of the drain, and their value should therefore be estimated, and dealt with on the same basic principle of full compensation as for lands taken and expropriated for public purposes under the Municipal Act.

Applying then such principle to the claims before me, I think the compensation to which the respective plaintiffs are entitled for the quantity of land occupied by the channel of the drain, should be based on the actual money value per acre of the land without buildings.

Then as to the portions of land adjoining the drain on which the excavated earth has been dumped or banked, the evidence establishes that such banking of the excavated earth has injured these portions for agricultural purposes, and thereby depreciated their value as compared with the other portions of the farms of the respective plaintiffs, and as it appears that the excavated earth on these portions is necessary for banks to prevent the waters of the drain overflowing and flooding the lands, and as the estate and title to those portions of the land remain in the respective owners, subject as aforesaid, I think the compensation should be based on the depreciation in value of the portions occupied by the banked or dumped earth. And I therefore assess such depreciation at one-half the money value per acre of such land without buildings.

To these damages must be added another claim which the evidence warrants me in finding, viz., that the dumping of the excavated earth on the portions of the land adjoining the drain has been done in an improper and negligent manner,

and that the respective plaintiffs are therefore entitled to recover against the municipality reasonable damages for dumping earth in a negligent and hilly manner. But in assessing these damages, the conclusion to be drawn from the case of Seely vs. Alden(3), I think is applicable, that where the cost of the removal of improper matter deposited on another's land would be greater than the actual value of the land, the true measure of damages must be ascertained on another and more reasonable basis. The estimates given by some of the plaintiffs' witnesses of the cost of levelling the dump are so excessive as compared with the actual value of the land, that I must seek less extravagant estimates and other practical men have indicated a cost which I think reasonable. I assess the damages for the dumping of the excavated earth in the negligent manner complained of at \$10 per acre, in addition to the damages for the depreciation in value of the portions of the land of the respective plaintiffs, covered by dumps of excavated earth.

As the proposed drainage work is the enlargement of this Raleigh Plains drain, it must be assumed that for the portion of land occupied by the original channel of the drain these plaintiffs have been compensated, and that their present claims are for the extra quantity of land now taken for the enlarged channel, and for the damages caused by the dumping of the excavated earth on other portions adjoining the channel.

With reference to the alleged neglect of the municipality to fence one or both sides of the drain, I have to say that by the common law, the owners of adjoining properties are not bound to fence either against or for the benefit of each other; and in the absence of fences each owner is bound to use proper means to prevent his cattle from trespassing on his neighbour's premises: Lawrence vs. Jenkins(4).

But under the doctrine of prescription any owner of land may become bound to maintain fences in his land. This

(3) 61 Pa. St. 302.

(4) L. R. 8 Q. B. 274.



doctrine, however, obviously implies the pre-existence of a fence for such a length of time as would bring it under the definition given in *Gale on Easements*(5), as a "spurious easement" affecting the land of the person on whose land the fence happens to be, and who becomes thereafter bound to keep his fences in a state of repair not only sufficient to restrain his own cattle within bounds, but also those of his adjoining neighbours, but not those of others.

And where there is no statutory provision, or prescription or contract, requiring an owner of land to keep up fences between himself and a neighbouring owner, it has been held that no action will lie against either by reason of the trespass of the cattle of one of such owners on the property of his neighbours: *Erskine vs. Adeane*(6).

In *Cornwall vs. Metropolitan Commissioners of Sewers* (7), it was held that the commissioners of sewers using for sewerage purposes an ancient tidal ditch which ran along the highway, were under no obligation to fence the same so as to protect from injury persons frequenting the highway.

The Municipal Act, R. S. O. (1897) c. 223, s. 437, in making it the duty of every municipality to make due compensation to the owners of real property entered upon or injuriously affected by the corporation in the exercise of its statutory powers, provides that the compensation for such shall include "the cost of fencing when required."

This expression "the cost of fencing when required," indicates, I think, that the duty of the municipality to provide fences is limited to cases where such duty is prescribed by statute, and therefore enforceable by action.

The legislative expression should therefore be paraphrased "when required by law." To ascertain what is required by law, reference may be had to the *Line Fences Act*, R. S. O. 1897 c. 284, s. 3 of which makes it the duty of owners of occupied adjoining lands to make, keep up, and repair, a just proportion of the fence which marks the boundary between them; and also to other sections of the Act which prescribe compulsory proceedings to enforce this statutory duty.

(5) 6th edition, p. 455.

(6) L. R. 8 Ch. 756.

(7) 10 Ex. 771.

To assist in determining whether this Act applies to municipalities, the case of *Osborne vs. City of Kingston* (8), should be considered, where under a statute somewhat in *pari materia*, it was held that municipal corporations are not "owners or occupants" of highways within the provisions of R. S. O. (1887) c. 202 (now R. S. O. c. 279 (1897)), respecting noxious weeds; nor does the word "land" in that statute include highway.

This decision is, I think, by analogy applicable to the present case; and having held that the soil of the drain does not vest in the municipality, I think the term "owner" in the Line Fences Act cannot therefore be construed as applying to the municipality, nor does "land" in the same Act mean a drain constructed under the Municipal Drainage Act.

For these reasons it must be held that to this drain the rule of the common law respecting fences applies to the defendant municipality, and that there is no statutory duty requiring it to make, keep up, or repair, a just proportion of a fence between the drain and the other lands of the parties through which it is constructed. And not being required to fence the drain, there can be no liability on the municipality for damages caused by cattle straying through the channel of the drain on to the farms of the respective plaintiffs.

The estimates of value of the lands of the respective plaintiffs given by the witnesses are conflicting. Similar conflicting estimates of value were given by witnesses in *Duggan vs. Enniskillen*, tried before me at Sarnia on the 8th July, 1898, and disposed of as follows: "The question of determining how damages should be assessed has often troubled jurors, who have to consider the extreme views of certain witnesses giving a high value, and the extreme views of certain other witnesses in giving a very small or no value for the damages complained of. It has been observed by a learned Judge that juries arrive at values by some sort of a compromise, which indicates that they believe the true value lies somewhere between the extreme estimates given by the witnesses. That view was considered by a former Lord

Chancellor of Ireland, Sir Anthony Hart, where, in a case reported in 1 Malloy, at p. 457, he said: "There is nothing which raises such difference of opinion as the value of land. Witnesses vary so widely that I know no other mode less unsatisfactory than a rough approximation by taking the mean of all their estimates." And speaking from my own experience in public life, I may say that in many cases legally trained intellects have had often to resort to much the same mode of arriving at a conclusion practically to put themselves in the position of jurors for the purpose of getting at the true value, and have found it as lying somewhere between the extreme values placed on the property by witnesses.

Adopting substantially the same mode for ascertaining the actual value of the lands of the respective plaintiffs, I make the following findings:

J. R. Rhodes—Value of land, \$50 per acre. For the injuries done to the plaintiff's property in the construction of the drainage work or consequent thereon the damages should be assessed as follows:

|   |         |
|---|---------|
| Land taken for channel, 80-100 acres at \$50 per acre.....    | \$40 00 |
| Land occupied by excavations, 1 50-100 acres at \$25 per acre | 37 50   |
| Allowance for levelling same, \$10 per acre .....             | 15 00   |
|   | <hr/>   |
|   | \$92 50 |

That the agreement for the settlement of damages caused by the overflow from government drain covered all the damages arising therefrom. If this plaintiff had brought an action for such damages, he could not spilt each item of such damage into several actions, therefore his claim of \$50 for such damages, as also his claim for a fence, and for damages done to his crops by straying cattle, must be disallowed.

R. Longmore—Value of land, \$47.50 per acre. As the drain divides his farm into two parts he is entitled to the cost of the farm bridge which he has constructed. (See *Re Byrne vs. Rochester* (9), *Thackery vs. Raleigh* (10)). His damages should be assessed as follows:

(9) 17 O. R. 354.

(10) C. & S. Drainage Cases 328; S. C. 25, A. R. 226.

|  |          |
|--|----------|
| Land taken for channel, 70-100 acres at \$47.50 per acre..   | \$33 25  |
| Land occupied by excavation, 1.20 acres at \$23.75 per acre. | 28 50    |
| Allowance for levelling, 1.20 acres at \$10 per acre .....   | 12 00    |
| Allowance for a bridge, 70 feet at \$1.50 per foot .....     | 105 00   |
|  | <hr/>    |
|  | \$178 75 |

His claims for fence and tile drain are disallowed.

W. Longmore—Value of land the same as J. R. Longmore's. This plaintiff having built a bridge jointly with S. Longmore to connect the severed portions of their respective farms, he is entitled to one-half the cost of the same; and his damages should be assessed as follows:

|  |         |
|--|---------|
| Land taken for the channel, 54-100 acre at \$47.50 per acre.   | \$25 65 |
| Land occupied by excavation, 86-100 acre at \$23.75 per acre.  | 20 42   |
| Allowance for levelling bank, 86-100 acre at \$10 per acre..   | 8 60    |
| Allowance for one-half the cost of a bridge, 60 feet at \$1.50 |         |
| per foot, \$90 .....   | 45 00   |
|  | <hr/>   |
|  | \$99 67 |

Claim for fence disallowed.

P. Ferguson and R. Moore—Value of their lands \$35 per acre. Their damage should be assessed as follows:

|   |          |
|---|----------|
| Land taken for channel, 2.10 acres at \$35 per acre .....   | \$73 50  |
| Land occupied by excavations, 5 16-100 acres at \$17.50 ... | 90 30    |
| Allowance for levelling 5 16-100 acres at \$10 per acre.... | 51 60    |
|   | <hr/>    |
|   | \$215 40 |

That the receipt for \$25 given by Ferguson to the municipality covered all his claims respecting Government drain No. 2. Therefore such claims and also a claim of both the plaintiffs for fences are disallowed. As both parties have made this drain the boundary line between their respective properties, the claim of each for a bridge is also disallowed.

As to costs, I find the sums claimed by each of these plaintiffs largely exceed the amount of damages to which they are entitled, viz.:

|  |          |
|--|----------|
| Rhodes claimed \$1,000 and is found entitled to .....        | \$ 92 50 |
| J. R. Longmore claimed \$1,634 and is found entitled to .... | 178 75   |
| W. Longmore claimed \$1,562.58 and is found entitled to....  | 99 67    |
| P. Ferguson and R. Moore claimed \$2,502 and are found       |          |
| entitled to .....  | 215 40   |

Comparing the amounts claimed as damages by each of these plaintiffs with the amounts to which they have been found entitled, the conclusion is irresistible that their claims were excessive—especially as they must have known what had been allowed as damages for substantially similar injuries in Thackery's case in July, 1897. Besides each of them has made claims for other damages to which he was not entitled by law; I must therefore direct that each party pay his own costs, but that the cost of the defendant municipality may be assessed against the lands and roads assessed for the drainage work.

## COURT OF APPEAL.

## CRAWFORD VS. TOWNSHIP OF ELLICE.

*Mandamus—Notice—Damages—Drain Insufficient to Carry Off Water.*

To entitle a person who or whose property is injuriously affected by the condition of a drain to a mandamus for the performance of such work as may be necessary to put the drain in proper condition, the notice required by section 73 of the Drainage Act, R. S. O. ch. 226, while not necessarily in technical form, must be so clear and precise that the municipality can decide whether the complaint is well founded or frivolous, and must be one which the municipality would be justified in acting upon under sub-section (a) of that section.

A letter referring to defects in the drain, and suggesting steps to be taken, but not calling upon the municipality to do specific work, is not sufficient.

The notice by which proceedings are initiated in Court cannot be regarded as a notice under section 73.

Judgment of the Drainage Referee affirmed.

A person who or whose property is injuriously affected by the condition of a drain is entitled to recover from the municipality charged with the duty of maintaining it such damage as he sustains by reason of its non-repair, whether caused by the flooding of his land by the waters of the drain, or by its failure to carry off the water which came upon the land in the course of nature.

Judgment of the Drainage Referee reversed.

This was an appeal by the plaintiff from the judgment of the Drainage Referee.

The facts sufficiently appear in the judgments.

The following judgment was delivered on the 27th of December, 1898, by

Thomas Hodgins, Q.C., Drainage Referee:—

The pleadings in this case state that the drainage work complained of was constructed in 1885, and was known as the "Maitland Drain;" that it was repaired in 1891-3; but that certain parts have since been filled in with silt, weeds, logs, willows and other obstructions, and that the plaintiff and others have repeatedly called the attention of the council of the defendants to the condition of the said drain, and the necessity of its being repaired; and finally the defendants

having neglected or refused to maintain the said drainage work, the plaintiff, being a person interested therein, and whose property was injuriously affected by the condition of the said drain, gave to the defendants notice in writing of the inefficiency of the said drain, and requested the defendants to improve the same. He therefore claims \$1,500 for damages, and a mandamus directing the defendants to properly repair and maintain the said drainage work, and other relief.

The plaintiff's evidence shews that when the drainage work was repaired in 1891 it afforded him sufficient drainage; but that owing to various causes it has since then got into disrepair and does not now carry the water off his lands, whereby his crops have been flooded and injured, and he has been unable to cultivate his farm as he expected. In answer to a question put by me at the close of his examination, he said that his claim for damages against the township was founded on this; that the water which came on his farm from rain, snow and hail in the usual course of nature, was not drained off his farm as he had expected it would have been by this Maitland drain.

The facts in this case seem in one respect to be similar to those disclosed in *Stephens vs. Township of Moore*(1). In that case Osler, J.A., said: "It is the duty of the defendants to keep the drain in repair. . . . It was made for the purpose of draining the plaintiff's property, and that of others interested in it; and if the defendants refuse or neglect to repair it, I do not think they can escape from their obligation, or be excused from performing it, short of proof that even if it were repaired it would, from changes in the surrounding conditions, be entirely useless to the plaintiff's property." Maclellan, J.A., added: "The plaintiff is entitled to have his land as free from water as the drain, in a proper state of repair, would make it, whether his land is under cultivation, or in a state of nature. If, for want of such repair, water stands upon his land or any part of it, either in greater quantity or for a longer time than it otherwise would, that

(1) C. & S. Drainage Cases, 283, and in appeal 25 A. R. 42.

is something he is not obliged to submit to, even although it has done him no actual pecuniary damage. It is an injury to a right; for his right is to have it otherwise."

It was held in that case that the plaintiff had not suffered any calculable pecuniary loss or damage attributable to such non-repair; but that being a person interested in the drainage work and whose property was injuriously affected by the condition of the drain, he was entitled to a mandamus compelling the defendants to maintain the drain as required by the Act.

No doubt the plaintiff in this case assumed he had the warranty of the defendants' council that the drain would be effective in draining his lands, and that his crops would be safe and productive. His claim for breach of such assumed warranty may be said to somewhat resemble one made by a cotton planter against the vendor of a drug which he had warranted would kill cotton worms, but which it failed to do, in consequence of which his crop was lost. The Court held that the plaintiff could not recover as damages the estimated value of the lost cotton crop, as such damages were too remote, conjectural and speculative: *Jones vs. George*(2).

I must therefore find, in the words of Mr. Byron Gurney in *Walker vs. Hatton* (3), that "the plaintiff may have been very ill-used, but he has no remedy;"—the rain, snow, and hail which came on his farm in the usual course of nature having been the proximate and natural causes of the loss he complains of.

In dealing with the claim for a mandamus to compel the defendants to maintain the drain, it appears from the pleadings and evidence that on the 9th August, 1897, the defendants' council passed a by-law, No. 359, appointing one W. F. VanBuskirk engineer, to examine and report on the said drainage work; that on the 23rd May, 1898, the engineer duly reported the state of such drainage work and prepared plans, specifications, and estimates of the cost of the proposed improvements, and also an assessment of the lands and

(2) 56 Texas, 149.

(3) 10 M. & W. 259.



roads within the drainage area in the townships of Ellice, Logan, and Elma, to provide for the cost of such improvements. It further appears that a meeting of the ratepayers was called to consider the report on the 30th July, 1898, that a by-law adopting the report of the engineer and the scheme of the proposed improvements and assessments, was provisionally passed by the defendants' council on the 31st October, 1898, and that a Court of Revision was held on the 7th December, 1898. The plaintiff's action was commenced on the 24th September, 1898, and the statement of claim was filed on the 31st October, 1898.

The Municipal Drainage Act, R. S. O. (1897) ch. 226, s. 73, provides that any municipality neglecting or refusing to maintain any drainage work, upon reasonable notice in writing from any person interested therein and whose property is injuriously affected by the condition of the drainage work, shall be compellable by mandamus to maintain the work.

It is a general principle of law that the writ of mandamus will not be granted unless there has been either a direct refusal in terms, or in any equivalent circumstances,—enough to satisfy the Court that the party who is bound to do the public duty withholds compliance, or so acts as to show that he determines not to do that which it is the object of the mandamus to enforce: *Reg. vs. Brecknock, etc., Canal Co.* (4). *Reg. vs. Bristol, etc., Co.* (5).

Further, with the expression "reasonable notice" in the statute, must also be considered another general principle of law which declares that where no time is expressly mentioned for the performance of a duty, the law considers that it should be performed within a reasonable time, having regard to the circumstances from which the reasonableness of time may be inferred: *Ellis vs. Thompson* (6). And what is a reasonable time for the performance of an act is a question of fact: *Startup vs. Macdonald* (7). And in dealing with a similar question in *Crawford vs. Toogood* (8), Fry, J., said: "Some latitude in respect of time is reasonable, and

(4) 3 A. & E. 217, S. P. (5) 4 Q. B. 162; S. C., 7 Jur. 233.

(6) 3 M. & W. 445. (7) 2 M. & Gr. 395. (8) 13 Ch. D. 158.

I think a notice ought to fix the longest time that could reasonably be required for the performance of the acts which remained to be done."

This rule as to reasonable time has been illustrated in the case of a public corporation charged with the construction of extensive drainage works within its territorial jurisdiction; and it was held that the corporation had not only a discretion respecting the emergencies of different portions of its territory, but was also entitled to a reasonable time for the commencement and completion of the work. Sir A. Cockburn, C.J., said: "In the discharge of this duty a reasonable time is necessarily implied, and when we consider the magnitude and extent of the drainage works, and the nature of the funds which are to defray the expense, there must be vested in the body on which that duty is cast some discretion to select the extent and order of their operations. The work must be done with reference to what is and proper under the circumstances." And Crompton, J., added: "It is indispensable that there should be a discretion placed in the corporation as to the order and time in which the necessary works are to be constructed:" Reg. vs. St. Luke's Vestry (9).

This policy of the law was also recognized in *Stephens vs. Moore*(10), where it was intimated that as the legislature has left the management of drainage matters largely in the hands of the local municipalities, the Court should refrain from interference with their discretion, unless where there had been an undoubted disregard of personal rights.

Another illustration of the policy of the Court in granting the writ of mandamus is *Ex parte Parkes*(11), where on it appearing that a railway company had some two years previous taken certain lands of the applicant for their railway, but were then proceeding with other works of construction which would cause further damage to the applicant's property, the Court held that the company was proceeding *bona fide*, and refused to grant a mandamus to compel them to take the

(9) 8 Jur. N. S. 308; S. C. 5 L. T. N. S. 744.

(10) 25 O. R. at p. 605.

(11) 5 Jur. 435.

necessary proceedings for assessing the compensation for the lands previously taken.

In this case nothing has been shewn from which it could be inferred that the defendants' council are not proceeding *bona fide*; on the contrary, viewing the extent of the work, the length of time taken by the engineer in examining, reporting upon and making assessments over three townships for the proposed improvements, I think that they were before action and are still proceeding *bona fide*, and that they are entitled to a reasonable time for the consideration of the engineer's report, and a reasonable discretion respecting the time for the commencement of this drainage work, which reasonable time had not expired when this action was brought.

The plaintiff's action therefore failing on the several issues raised must be dismissed with costs, as also the actions of C. Kerr and J. E. Kerr against this defendant municipality in which the same issues were raised.

From this judgment the plaintiff appealed to the Court of Appeal. (See 26 O. A. R. 484.) And the appeal was argued before Burton, C.J.O., MacLennan, Moss, and Lister, J.J.A., on the 5th and 6th of October, 1899.

J. P. Mabee, for the appellant.

Matthew Wilson, Q.C., for the respondent.

November 14th, 1899. The judgment of the Court was delivered by

Lister, J.A.:—

This action, and two others by John E. Kerr, and Colin Kerr, were begun by writs issued on the 24th of September, 1898, and were brought to recover damages due to the failure and neglect of the defendants to maintain and keep in repair a drain known as the "Maitland Drain."

The injury complained of was occasioned not by the waters of the drain overflowing and flooding the plaintiff's lands, but from waters which came upon the plaintiff's lands from rain, snow, and hail, which were not drained off and

carried away as they would have been if the drain had been kept in repair.

After statements of claim and defence had been delivered, the actions were, under the provisions of the Drainage Trials Act, referred to the Drainage Referee.

The action of the plaintiff Crawford was brought not only for damages, but for a mandamus.

The drain was constructed by the defendants under a by-law passed on the 18th of May, 1885, under the drainage provisions of the municipal Act then in force, and the expense of construction was imposed upon the lands to be benefited by the work, and they were under the by-law assessed therefor.

The plaintiff's lands were included in such assessment, and were subsequently assessed for part of the expense of repairs done to the drain.

The drain was out of repair in the year 1894, and it continued in that condition up to the time of the trial.

On the 26th of November, 1894, the plaintiff wrote to the clerk of the defendant municipality as follows:—

“Dear Sir,—Herewith I beg to call the attention of your council to the insufficiency of the Maitland drain—south branch—owing to cattle on unoccupied lots going to the drain for drink, and to the further fact that there is little if any fall in this part of the drain; the ditch is badly filled in from Harloff's hill to the eastern end of the drain. There are also other lands not included in the original by-law that now drain into the Maitland, and in any scheme of just taxation should now be assessed.

“I am also requested by Jacob Stackley, owner of lot 19, concession 16, to ask for the improvement of the main drain from the point where the last improvement left off to the eastern end of said drain.

“I also beg to point out to your council that a number of lots in Mornington have recently been connected with the Maitland drainage system and that they should not have the benefit of this outlet for their lands without paying for it. When an improvement is made it should belong to those who

pay for it. I therefore respectfully request your council to send on a competent engineer to assess those lands for benefit that the Maitland drain people have already paid for, and to do in time to have said lands contribute to the costs of the late litigation, and furthermore, if your council have not the power herein asked for, that the aid of the Legislature be invoked."

The plaintiff Crawford, on the 20th of November, 1897, and the other plaintiffs on the 23rd of January, 1898, began proceedings by notice under section 93 of the Municipal Drainage Act for the recovery of damages and for a mandamus in respect of the drain, which they discontinued before the present actions were commenced.

The Referee appointed the 16th of December, 1898, for the trial of these actions. The plaintiff Crawford's case was first taken up. It was arranged that the evidence taken in his case should be applicable to the other two cases. He was called and examined as a witness on his own behalf, and was the only witness examined. At the close of his evidence it was agreed that the cases should not then be proceeded with, but that the Referee should determine whether on the facts proved the defendants incurred any liability in respect of the injuries complained of, and that if his decision should be adverse to the plaintiffs, and should on appeal be reversed by this Court, or if it should be in favour of the plaintiffs, the trials should be proceeded with on a subsequent day then fixed.

The Referee found as follows: "The plaintiff's evidence shews that when the drainage work was repaired in 1891, it afforded him sufficient drainage, but owing to various causes it has since then got into disrepair and does not now carry the water off his lands, whereby his crops have been flooded and injured and he has been unable to cultivate his farm as expected." But he held that the defendants incurred no liability for damages resulting from water, which came upon the plaintiff's lands from rain, snow, and hail, in the usual course of nature, not being drained off and carried away by reason of the non-repair of the drain.

For the purposes of this appeal the actions were by an order of the Referee, made on the 1st February, 1899, consolidated.

In my opinion the appeal in so far as it relates to the liability of the defendants for damages occasioned by their neglect to keep the drain in repair, ought to be allowed.

The drain is one which the statute requires the defendants to maintain or keep in repair, and for neglect or refusal to fulfil this duty they are, by section 73 of the Municipal Drainage Act, made liable in damages to any person interested, who or whose property is injuriously affected by such neglect or refusal.

The learned Referee has found that the defendants failed to perform their statutory duty to keep this drain in repair, and further, that such failure resulted in injury to the plaintiffs. Upon these findings the plaintiffs, who are persons interested in the drain and injuriously affected by its condition, are entitled to recover from the defendants such damages as they may be able to prove they have sustained in consequence of such neglect on the part of the defendants, and it appears to me to be quite immaterial whether the injury complained of was caused by the overflowing and flooding of the lands by the waters of the drain, or by its failure to carry off the water which came upon the lands by rain, snow, and hail, if the damage in either case was due to its non-repair.

Adopting the language of my brother Osler in *Stephens vs. Moore*(12), the plaintiffs are entitled to have the drain they have paid for kept in a reasonable state of repair. It was made for the purpose of draining their property and that of others interested in it, and if the defendants refuse or neglect to repair it I do not think they can escape from their obligation, or be excused, short of proof that even if it were repaired it would from changes in the surrounding conditions be entirely useless to the plaintiff's property. And my brother MacLennan in the same case, at p. 45, said: "If for want of such repair water stands upon his land or any part of it, either in greater quantity or for a longer time than

it otherwise would, that is something he is not obliged to submit to, even although it has done him no actual pecuniary damage. It is an injury to a right, for his right is to have it otherwise." See also *White vs. Gosfield* (13), *Raleigh vs. Williams*(14).

Then with respect to the right of the plaintiff Crawford to a mandamus. It is finally settled that the giving of the notice to repair, prescribed by section 73 of the Act, is a condition precedent to the right to maintain an action against a municipality for mandamus to compel it to repair a drain which it is under statutory obligation to maintain: *Raleigh vs. Williams*(14).

The defendants say that the plaintiff is not entitled to maintain his action for mandamus, because he did not before action give to them the notice to repair required by section 73. The plaintiff, on the other hand, contends that either his letter of the 26th of November, 1894, or the notice of the 20th of November, 1897, was a sufficient notice to repair within the meaning of section 73.

This section, in so far as it relates to a mandamus, enacts, that "any municipality neglecting or refusing to maintain any drainage work as aforesaid, upon reasonable notice in writing from any person or municipality interested therein who or whose property is injuriously affected by the condition of the drainage work, shall be compellable by mandamus issued by the Referee or other Court of competent jurisdiction to maintain the work, unless the notice shall be set aside or the work required thereby varied as hereinafter provided."

Then sub-section (a) authorizes an application to the Referee by the municipality receiving the notice to set the same aside, and declares that the Referee shall after hearing the parties and witnesses adjudicate upon the questions in issue, and confirm or set aside the notice, as to him may seem proper, or order that the work of maintenance shall be done wholly or in part.

(13) (1883) 2 O. R. 287, affirmed; (1884), 10 A. R. 555.

(14) [1893] A. C. 540.

The question is whether the plaintiff before action gave to the defendants such a notice to repair as will satisfy the statute.

I am of opinion that there was no sufficient notice to repair given to the defendants, and, therefore, the plaintiff as to this branch of his case fails.

It seems to me that what the statute requires is an unconditional notice or demand to repair under its provisions, given or made by a person interested in the drain, and who or whose property is injuriously affected by its condition.

The notice or demand ought to be for the performance of that which the plaintiff afterwards seeks to compel by mandamus; in short, it ought to be so clear and precise in its terms that the municipality might be able to ascertain whether the complaint was well founded or frivolous, and it ought to be a notice which the municipality would be justified in treating as a notice under section 73 for the purpose of an application to the Referee under sub-sec. (a).

It is to be observed that the plaintiff's letter of the 26th of November, 1894, refers to several matters concerning the drain, and among them to the insufficiency of its south branch due to the cause therein mentioned, and to its being badly filled up from Harloff's Hill to the eastern end thereof. It does not state that by reason of its condition he was in any way injured, nor does it require the defendants to remove the defects by repairing the drain. Looking at the whole letter it seems to me that what the plaintiff really wanted was to have the drain so improved as to give it an increased fall, to be paid for by owners of lands then using it as an outlet for their drains, but who had not contributed to its original cost.

I think the test as to whether this letter can be looked upon as a sufficient notice to repair under section 73 is, could the defendants have treated it as a notice for the purpose of an application to the referee under sub-sec. (a) of sec. 73 to set it aside? It seems to me that such an application would fail if opposed by the plaintiff, who might well say this letter



does not call upon the municipality to repair the drain, or that it does not state that the drain was causing injury to him or his property; in fact he might successfully contend that it was not, and was not intended to be, a notice under section 73. If it is not a notice under this section the referee would be without jurisdiction. Manifestly the notice must be one which comes within section 73; this, in my opinion, does not.

And it is, I think, quite clear that the notice of the 20th of November, 1897, cannot be regarded as a notice to repair under section 73. This notice was the commencement of proceedings taken under section 93 of the Municipal Drainage Act, and is a notice which the referee had no jurisdiction to deal with under sub-section (a) of section 73.

While I do not think that the notice to repair must be framed with technical precision, I do think that it must inform the municipality with reasonable particularity of what is complained of in the way of non-repair, and what the municipality is required to do in respect of the matter complained of.

The appeal, in so far as the same relates to the liability of the defendants for damages, must be allowed with costs relating to this branch of the appeal, and the judgment must stand as regards the second branch of the appeal. The costs of the trial to be in the discretion of the referee.

*Appeal allowed in part.*

COURT OF APPEAL, ONTARIO.

TOWNSHIP OF ORFORD VS. TOWNSHIP OF HOWARD.

(Reported 27 O. A. R., page 223.)

*Injuring Liability—Natural Watercourse—R. S. O. ch. 226, sec. 3, sub.-sec. 3.*

Under sub-sec. 3 of sec. 3 of R. S. O. ch. 226, lands in one municipality from which water has been caused to flow upon and injure lands in another municipality, either immediately or by means of another drain, or by means of a natural watercourse, may be assessed and charged for the construction and maintenance of a drainage work required to relieve the injured lands from such water.

In re Orford and Howard (1891), 18 A. R. 496; In re Harwich and Raleigh (1894), 21 A. R. 677; and Broughton vs. Grey and Elma (1897), 27 S. O. R. 495, distinguished.  
Judgment of the Drainage Referee affirmed.

This was an appeal by the township of Orford from the judgment of the Drainage Referee, before whom the appeal by the township of Orford, from the engineer's report, etc., came on for hearing at Chatham on the 29th and 30th of November and the 1st of December, 1898.

The following judgment was delivered on the 28th of December, 1898, by

Thomas Hodgins, Q.C., Drainage Referee.

The proposed drainage work affected by this appeal is initiated by Howard, and is intended to provide an improved outlet for a series of drains constructed almost entirely through the channel of an original waterway—some under the Ditches and Watercourses Act, especially the Kane drain and others by individual farmers—and which carry the waters from Orford and Howard into a marsh or basin in the third and fourth concessions of the latter township.

There are several grounds of appeal, but it is only necessary to consider two: (1) That the water from Orford flows in natural waterways from the highlands in that township in

the manner they naturally went and do; and that therefore the lands in Orford are not liable to be assessed for the proposed work; and (2) that the assessment of the lands in Orford is illegal, and excessive.

Involved in this first mentioned ground of appeal is the question, how far the legislation of 1894 has affected the judicial interpretations given to section 590 of the Municipal Act, R. S. O. (1897) and of 55 Vict. ch. 42 (1892), respecting assessments for improved outlets in drainage work through natural watercourses.

It has been conceded that for some purposes creeks and streams which were originally natural watercourses, when deepened, widened, straightened or otherwise improved, come within the description or definition of "drains" or "drainage work" under the drainage laws: *Harwich vs. Raleigh* (1). This also seems clear from the definition of "drainage work" in the Drainage Act of 1894, s. 3: That is to say: the deepening, straightening, widening, clearing of obstructions or otherwise improving of any stream, creek or watercourse, the lowering of the waters of any lake or pond, or by any or all of said means.

Prior legislation has used a variety of expressions which seem to indicate a similar meaning. Thus in 35 Vict. ch. 26 (1872), 36 Vict. ch. 39 (1873), and R. S. O. (1877) ch. 174, the words are "the deepening of any stream, creek or watercourse or draining of the property" (describing it). This by 45 Vict. ch. 26 (1882), was extended to "the straightening of any stream or removal of obstructions which prevent the free flow of any waters of any stream, or the lowering of the waters of any lake or pond for the purpose of reclaiming flooded land, or more easily draining any lands and to any works which it may be deemed expedient to dig, construct or make for the purpose aforesaid or any of them. By 46 Vict. ch. 18, s. 570, R. S. O. (1887) c. 184, s. 569, and 55 Vict. ch. 42, s. 559, a slight change in the phraseology was made which is quoted above from section 3 of the Drainage Act of 1894 and R. S. O. (1897) ch. 226.

A further reference to a statute in *pari materia* in which the expression "ditch" is interpreted to mean and include "a drain open or covered wholly or in part and whether in a channel of a natural stream, creek or watercourse or not." R. S. O. (1897) ch. 285.

Section 590 of the Municipal Act R. S. O. ch. 184, which was the ancestor of the present section, had given rise to conflicting judicial interpretations. In *Orford vs. Howard*(2), it had been held that it only applied to drains or outlets artificially constructed, and not to natural watercourses which had been enlarged and deepened under the provisions of the Drainage Act.

In 1892 more amendments were made to the section by 55 Vict. ch. 42, and in 1893 my predecessor, Mr. Britton, Q.C., held that these amendments had altered the law and had brought such natural watercourses within its provisions: *Harwich vs. Raleigh* (1).† His decision was appealed, but owing to the Judges of the Court of Appeal being equally divided in opinion, was affirmed (3).

Finally in *Broughton vs. Grey* (4), the Supreme Court affirmed *Orford vs. Howard*(2), and in effect reversed *Harwich vs. Raleigh*(1), holding that the expression "drain constructed by a municipality" in section 590, did not include a natural stream, creek or watercourse which had been deepened or enlarged under the provisions of the drainage laws.

But between the decision of *Orford vs. Howard*(2), and *Broughton vs. Grey* (4), the Legislature in 1894 made further amendments to the law and substituted the more comprehensive sub-sections 3 and 4 of section 3 of the Drainage Act, 57 Vict. ch. 56, for section 590 of the Act of 1892.

A comparison of the clauses respecting "outlet" in the two Acts will show the change in the law.

Section 590 of 1892: "If a drain already constructed, hereinafter constructed or proposed to be constructed, by a

(2) 18 A. R. 496, 1891.

† C. & S. Drainage Cases, 147.

(3) Ibid 21 A. R. 677, C. & S. Drainage Cases, 157.

(4) 27 S. C. R. 495 (1895).

municipality, is used as an outlet, or will provide when constructed an outlet for the water of the lands of another municipality, or of a company or individual, the lands that use or will use such drain when constructed as an outlet, either immediately or by means of another drain from which water is caused to flow upon and injure lands, may be assessed . . . for the construction of the drain so used, or to be used as an outlet aforesaid."

Section 3, sub-section 4 of 1894: "The lands and roads of any municipality, company or individual using any drainage work as an outlet, or for which when the work is constructed, an improved outlet is thereby provided, either directly or through the medium of any other drainage work, or of a swale, ravine, creek or watercourse may . . . be assessed and charged for the construction and maintenance of the drainage work so used as an outlet."

There are expressions in the latter section which indicate that the Legislature of 1894 has amended its will of 1892, which gave the legacy of litigation to which I have referred; and has cleared away the judicial difficulties of interpretation which its earlier legislation will have created.

These expressions are "using any drainage work as an outlet," which "drainage work" is interpreted by sub-section (1) to mean a constructed drain or a natural stream, creek or watercourse which has been deepened, straightened, widened, cleared of obstructions or otherwise improved; and the expression "swale, ravine, creek or watercourse," which may perhaps include an unimproved natural creek or watercourse.

There are some general propositions for the interpretation of statutes which may be condensed as follows: (1) Ascertaining the interpretation given to the law before the statute of amendment. (2) Ascertain the mischief or defect against which the law did not then provide; for the intention of the makers of an amending statute is sometimes to be discovered from the cause or necessity of the making an amendment. (3) Make such construction of the amending statute as will cure the defect and give force and life to the remedy

according to the true intention of the makers of the Act. See further Dwarri's Statutes, 563. et seq.

Applying these propositions to the amendment of 1894, the conclusion seems to be that the legislature recognizing the judicial difficulties created by the Act of 1892, intended to make its meaning more clear by expressions which enlarge the scope and meaning of the original section 590.

Adopting these conclusions, I must hold that this ground of appeal should be dismissed.

I find on the evidence that water is caused to flow from the lands and roads of Orford into Howard, and to injure the lands in the marsh or basin in the latter township; and that such Orford lands and roads are assessable for the proposed drainage work.

I give effect to the other ground of appeal and find that the drainage area to be assessed in Orford contains 468 acres instead of 590 acres, and that its proportion of assessment for the cost of the proposed drainage work at 13 cents per acre is \$60.84.

I give no costs to either party; but each municipality may add their costs of these proceedings to the amounts to be assessed within their respective drainage areas.

The appeal to the Court of Appeal was argued before Osler, Maclellan, Moss, and Lister, J.J.A., on the 22nd November, 1899.

Douglas, Q.C., and Shepley, Q.C., for the appellants.

Matthew Wilson, Q.C., for the respondents.

March 27th, 1900. Lister, J.A.:—

This is an appeal by the township of Orford from the judgment or decision of the Drainage Referee dismissing its appeal to him against the report, plans, etc., of Howard, in respect of the proposed improvement of the west branch of the Cranberry Marsh drain.

The townships of Howard and Orford adjoin, Howard being the lower and Orford the higher or upper municipality.

The drain is wholly within the limits of Howard and was constructed under the authority of a local assessment by-law by and at the cost of Howard.

Notice having been given to the council of Howard that the drain was out of repair, the council, by a resolution passed on the 6th of November, 1897, appointed Angus Smith, civil engineer, to prepare a report, etc., and make an assessment; and he thereafter made a report which bears date the 2nd July, 1898, which, with the plans, etc., that he had prepared, and the assessment that he had made, were laid before the council on the last mentioned date.

He reported that: "This drain will require to be deepened and widened to a considerable extent, so as to carry the waters brought to it by the Balmer, Burley and Skakel award drain, and to give sufficient drainage to the surrounding lands;" and he thereby recommended that the drain should be improved so as to comply with the specifications which accompanied the report; and he estimated the cost of the proposed work, including engineer's and clerk's fees, etc., at the sum of \$355, which sum he assessed and charged against lands and roads in Howard only, as set forth in the schedule of assessment annexed to his report.

The council of Howard, instead of adopting the report, passed a resolution referring it back to the engineer for the purpose of considering the advisability of assessing other lands. The resolution is in these words: "Moved by George Handy, seconded by A. F. Campbell, that the report of Angus Smith, civil engineer, on the improvement of the west branch Cranberry Marsh drain, be referred back to consider the advisability of placing more lands on the assessment. Carried."

On the authority of this resolution the engineer prepared and laid before the council another report bearing date the 5th of August, 1898, to which was attached another assessment schedule. By this report the work recommended by his former report was not changed. He estimated the cost of the proposed work, including engineer's and clerk's fees, etc., at \$377, which he assessed and charged against lands and roads

in both townships as shewn in the assessment schedule attached to the report. Lands and roads in Orford were assessed for \$86 as for injuring liability, and lands and roads in Howard for \$291 as for benefit and injuring liability. On the 6th of August, 1898, the council provisionally passed a by-law in the usual form authorizing the construction of the work and the borrowing of the necessary funds to cover its cost, etc. A copy of the report, etc., was served on the respondents in conformity with the statute, and they appealed therefrom to the Drainage Referee, who, after hearing the evidence, found as follows:

"I find on the evidence that water is caused to flow from the lands and roads in Orford into Howard and to injure the lands in the marsh or basin in the latter township, and that such Orford lands and roads are assessable for the proposed drainage work." Upon this finding the Referee gave judgment dismissing the appeal; and from this judgment the appellants now appeal.

The evidence shewed that the west branch of the Cranberry Marsh drain is, or at one time was, a marsh or swale, and parts of it may still be so described. This marsh or swale commences in the sixth concession of Orford and extends in a south-westerly direction in Orford, entering Howard in the sixth concession and extending thence in a south-westerly direction through Howard to about the second concession of Howard. It is of unequal width and without any defined channel. The drain in question commences at a point in the bed of the swale between the north and south halves of lot 14 in the third concession of Howard and extends northerly and north-easterly to the east limit of lot 14 in the block of land between the second and third concessions of Howard. In the bed of the swale and commencing at the road in the sixth and seventh concessions of Orford and extending to the head of the drain in question, drains have been constructed, some by farmers and others under the Ditches and Watercourses Act, but all connected so that the waters are conducted thereby and discharged into the drain in question, and being insufficient to receive and carry off all the water



thus brought into it, the lands of Howard were flooded and injured. In order to relieve the lands thus injured it was deemed expedient by the council of Howard to enlarge the west branch of the Cranberry Marsh drain; and to that end Howard initiated the proceedings complained of. And the engineer, assuming to act under the authority of subsec. 3 of sec. 3 of 57 Vict. ch. 56 (O.), R. S. O. ch. 226, assessed lands in Orford as for "injuring liability."

There was much evidence given as to whether the drains in Orford caused more of the water to flow from their lands into Howard than would naturally have found its way there. The Referee found that such was the effect of the Orford drains and I think the evidence sustains his finding.

The liability of the lands in the municipality of Orford to contribute as for "injuring liability" to the cost of the proposed work depends upon the construction to be given to sub-sec. 3 of sec. 3 of 57 Vict. ch. 56 (O.), R. S. O. ch. 226, which reads as follows:

"If from the lands or roads of any municipality, . . . water is by any means caused to flow upon and injure the lands or roads of any other municipality . . . the lands and roads from which the water is so caused to flow may . . . be assessed and charged for the construction and maintenance of the drainage work required for relieving the injured lands or roads from such water . . . and such assessment may be termed 'injuring liability.'"

A brief review of the law as it was prior to this enactment may shed light on the intention of the Legislature in enacting it. The statute then in force was 55 Vict. ch. 42 (O.), "The Consolidated Municipal Act, 1892," and the section of that Act corresponding to sub-sec. 3 of sec. 3 of 57 Vict. ch. 56 (O.), is sec. 590, which is in these words:

"If a drain already constructed, hereafter constructed or proposed to be constructed by a municipality, is used as an outlet or will provide when constructed an outlet for the water of the lands of another municipality, . . . or if from the lands of any municipality, . . . water is by

any means caused to flow upon and injure the lands of another municipality, . . . then the lands that use or will use such drain when constructed as an outlet either immediately, or by means of another drain from which water is caused to flow upon and injure lands, may be assessed . . . for the construction and maintenance of the drain so used or to be used as an outlet as aforesaid; or for the construction and maintenance of such drain or drains as may be necessary for conveying from such lands the waters so caused to flow upon and injure the same."

This question came before this Court in the case of *In re Orford and Howard* (2), upon the construction of sec. 590, R. S. O. (1887) ch. 184, the section of that Act corresponding with sec. 590 of the Act of 1892. This case in its facts is very similar to the present case. There the surface waters of the upper municipality were caused to flow into a natural watercourse connecting with a drainage work constructed by the lower municipality in the bed of the creek. It was held that the section applied only to drains strictly so called, that is to artificially constructed outlets, and that a municipality from which surface waters flowed, whether by drains or by natural outlets, into a natural watercourse, could not be called upon to contribute to the expense of a drainage scheme merely because the natural watercourse was used as a connecting link.

Precisely the same question that arose in *In re Orford and Howard* (2), again came before this Court upon the construction of sec. 590, 55 Vict. ch. 42 (O.), in the case of *In re Harwich and Raleigh* (1). The Court divided, Chief Justice Hagarty and the present Chief Justice being of opinion that where there is a drain constructed or improved by one municipality which affords an outlet either immediately or by means of another drain or natural watercourse for waters flowing from lands in another municipality, the municipality that had constructed or improved the outlet could, under this section, assess the lands in the adjoining municipality for a proper share of the cost of such construction or improvement; while Mr. Justice Osler and Mr. Justice Maclellan,

following *In re Orford and Howard* (2) were of opinion that the section applied only to drains properly so called and not to natural watercourses which had been artificially deepened or enlarged. In the result the decision of the Drainage Referee, that sec. 590 authorized such an assessment, was affirmed. But in the case of *Broughton vs. Grey and Elma* (4), in which the same question was raised upon the construction of sec. 590, the case of *In re Orford and Howard* (2), and the opinions of Mr. Justice Osler and Mr. Justice Maclellan in *In re Harwich and Raleigh* (1), were approved, and it was held that sec. 590 of 55 Vict. ch. 42 (O), applied only to drains properly so called and not to watercourses which had been deepened or enlarged. "A natural stream," said Mr. Justice Gwynne, who delivered the judgment of the Court (p. 502), "running through a municipality in which a drain is constructed by the municipality, and into which the waters brought down by the drain are discharged for the purpose of being carried off thereby, is no part of the drain constructed by the municipality; and lands in another municipality situate higher up on the same stream into which the lands in such municipality are also drained by drains discharging their waters into the same stream within the limits of the upper municipality, can in no sense be said to use a drain constructed by the lower municipality within its own limits, and which discharges its waters into the same stream, and therefore such lands are not by any of the Acts subjected to the obligation of contributing to the cost of the construction of a drain in the lower municipality from which, as not using it, they do not, and cannot, derive any benefit." Again he said: "The whole scheme of the legislation upon the subject is that they who derive benefit from such a work, and they only, shall bear the burden of its construction and maintenance." And again, he said (p. 507): "That drain never has been used as an outlet for waters on lands in Elma whether brought into the drain either immediately or by means of another drain, nor is it suggested that the drain so originally constructed when the work proposed to be undertaken shall be completed will provide such an outlet for any

lands in Elma. What the by-law regards as an outlet for which the lands in Elma have been assessed plainly is the natural stream called Beauchamp Creek as proposed to be deepened."

And now the question is again presented upon the construction of sub-sec. 3 of sec. 3 of 57 Vict. ch. 56 (O.), R. S. O. ch. 226, "The Municipal Drainage Act." Sub-sections 3 and 4 of this Act correspond to sec. 590 of the Consolidated Municipal Act, 1892. For the appellants it was argued that sub-sec. 3 of sec. 3 of 57 Vict. ch. 56 (O.), does not change or alter the meaning of sec. 590 of the Consolidated Municipal Act, 1892, as construed by the cases before cited, and therefore the liability of lands in an upper municipality to contribute to the cost of a drainage work constructed by and in a lower municipality must in the circumstances here be governed by those cases. I must dissent from this contention. There is, in my opinion, nothing in the language of the sub-section to warrant such a view. A comparison of sub-secs. 3 and 4 with sec. 590 makes it perfectly apparent, as it appears to me, that the Legislature in enacting these sub-sections had in view the cases of *In re Orford and Howard*(2) and *In re Harwich and Raleigh*(1)—'(the case of *Broughton vs. Grey* (4) was then pending)—and intended to alter and extend sec. 590 so as to impose upon lands in a municipality from which water has by any means been caused to flow upon and injure lands in another municipality a liability to contribute to the cost of a drainage work such as the one in question here, without regard to whether such water has been caused to flow upon and injure such lands either immediately or by means of another drain or by means of a natural watercourse into which it has been conveyed and discharged for the purpose of being carried away. The language of the sub-section is clear and unambiguous. In plain terms it declares that if by any means water is caused to flow upon and injure the lands of another municipality, the lands from which such water is caused to flow may be assessed, etc. The sub-section obviously refers to waters artificially caused to flow and which would not otherwise find their way to the lower lands.

The words (upon which the judgments in *Broughton vs. Grey* (4) largely proceeded) in sec. 590, "then the lands that use or will use such drain when constructed as an outlet either immediately, or by means of another drain from which water is caused to flow upon and injure lands," are omitted from both sub-sections. Then sub-secs. 3 and 4 distinguish assessment liability for "outlet" from liability for injury occasioned to the lower lands from the waters of the upper lands being caused to flow upon and injure them. The former liability is founded upon the benefit which the upper lands will derive from the construction of an outlet or an improved outlet: see cases *supra*; and the latter liability arises not by reason of any benefit that the upper lands will derive, but in respect of the injury sustained by the lower lands resulting from the waters of the upper lands being caused to flow upon and injure the lower lands. This liability is, by sub-sec. 3, termed "injuring liability." Sub-section 4, which relates to "outlet," was obviously intended to overcome, and, in my opinion, does overcome, the decisions before cited, by providing that lands using a drainage work as an outlet either directly or by means of any other drainage work or of any swale, ravine, creek, or watercourse, may be assessed as for outlet. Manifestly sub-secs. 3 and 4 are framed so as to enlarge the liability created by sec. 590 at least to the extent before indicated. To place any other construction upon sub-sec. 3 would, as it seems to me, defeat its plain object.

Upon the evidence I do not think that what occurred when the council of Howard referred the report back to the engineer can be regarded as an interference with his "independent judgment."

I do not think the other objections raised and argued are fatal to the report.

The appeal must be dismissed with costs.

Osler, J.A.:—

I agree in the result, but I do not think it is necessary in this case to decide whether the law laid down in *Broughton vs. Grey* and *Elma* (4), has been changed by the recent legislation.

MacLennan and Moss, JJ.A., concurred.

*Appeal dismissed.*

COURT OF APPEAL, ONTARIO.

WIGLE ET AL. VS. TOWNSHIP OF GOSFIELD SOUTH.

*Damages—Drainage into Natural Watercourse—Division of Township.*

A township, in which extensive drainage works had been constructed, was divided into two townships by a statute which provided that the assets and debts of the original municipality should be divided between the new municipalities, each remaining liable as surety for the proportion of the debts it was not primarily liable to pay, and the provisions of the Municipal Act as to the separation of a junior from a senior township to be applied, as far as possible.

Held, that an action for damages incurred before the division caused by the drainage works, part of the area of which was in each township, and asking to have the drains kept in repair, must be brought against both townships and not against that one only in which the plaintiff's land was situated.

Judgment of the Drainage Referee reversed.

This was an appeal by the defendants from the judgment of the Drainage Referee, to whom the actions were referred pursuant to the Drainage Act of 1894.

The facts sufficiently appear in the judgments.

The following judgment was delivered on the 10th of January, 1899, by

Thomas Hodgins Q.C., Drainage Referee:—

The plaintiffs own land along a creek or water-course known as Wigle Creek, and they complain that owing to a drainage work constructed in 1885 by the former township of Gosfield their lands, which (except a portion of one farm) are not within the drainage area, have been injured by the collected waters brought down by the drain No. 47 in large quantity and force, and poured into the creek, by which means their flat lands adjoining the creek are damaged to such an extent that they cannot be used for pasture or other agricultural purposes.

The law gives township municipalities large powers to construct drainage works, and to provide a sufficient outlet

for "the safe discharge of water at a point where it will do no injury to lands or roads." These statutory powers to construct drains and outlets must be construed to mean that the waters should be carried to its ultimate place of discharge, and not so as to impose a greater burden on lower lands than nature had subjected them to, and so long as these municipalities exercise their legal powers reasonably they will be protected, for their statutory liability is limited.

In *Orford vs. Howard* (1), *MacLennan, J.A.*, stated (p. 505) that "by the common law it is the right of every land-owner to drain his land into any natural watercourse accessible to him," but he intimated that such land-owners are to "exercise their rights reasonably," whether they do so individually or collectively.

What is a reasonable exercise of the rights of land-owners must be measured by the maxim *sic utere tuo ut alienum non laedas* (so use your own property as not to cause a nuisance or an injury to that of others), and may be illustrated by the following extract from *Angell on Watercourses*, p. 513, s. 335: "If a man's land is materially damaged by water thrown upon it by reason of the acts of another, it can make no difference what the source of the water may be, whether it be bank water, or the flowage of the same or the water of another stream. The wrong consists in turning any water upon the land which does not naturally flow in that place; and it can make no difference whether the water wrongfully turned upon a man's land against his will flows in the channel of an ancient stream, or a course where no water flowed before, if similar damage results."

And again, "If the owner of the upper lands wrongfully direct an unnatural quantity of water upon the ground of a lower neighbour by collecting small streams together and discharging at one place, or by other means, on such lower lands, the neighbour below may have an action against him." *Ib.* p. 125.

Every owner of land who claims a right either to throw water back, or to increase or diminish the quantity of water

which is accustomed to descend its natural watercourse, whereby other owners of land sustain actual damage, must prove either an actual grant or license, or a right by prescription: *Wright vs. Howard* (2).

It is contended by the defendant municipality that under the clause (4) in the statute dividing the former township of Gosfield into two municipalities of Gosfield North and Gosfield South (50 Vic. c. 51), which provides that the corporation of Gosfield North shall be a continuation of the corporation of the former Township of Gosfield, the injuries complained of by the plaintiffs in these actions should be claimed against the municipality of Gosfield North, as the drainage work which damages the plaintiff's lands was constructed by the former Township of Gosfield, of which the corporation of Gosfield North is now the continuation or representative.

This contention might be a reasonable one if it was sought in this action to deal with questions within the legal municipal powers and duties of the former municipality, but what is complained of by these plaintiffs is that a wrong or tort has been done to their properties by the excessive quantity of water which is collected by an extensive network of drains from the lands of the defendant municipality, and of the more northerly municipality of Gosfield North and poured into the natural channel of Wigle Creek.

I think it must be assumed for the purposes of this action that nature had determined the water burden of Wigle Creek, and had given it a channel so as to enable it to carry to the lake the waters which naturally flowed into it, but it seems that nature did not provide it with the capacity necessary for the heavier water burden which artificial constructions and an enlarged drainage area had compelled it to carry. It has, however, been forced into use as an outlet for these additional waters without the formalities prescribed by law, and without provision being made for the safe discharge of these waters at a place where they will do no injury to lands or roads.

(2) 1 Sim. & St. 190; Broom on Legal Maxims, p. 277.



Then, is the defendant municipality, or is Gosfield North, as the "continuation of the corporation of the Township of Gosfield," liable to the plaintiffs for the injuries complained of? If the action was to enforce a contract or a statutory right to compensation, the contention of the defendant municipality might require further consideration, but the rule indicated by Lord Kenyon, C.J., in *Mitchell vs. Tarbutt* (3), settles this question; if the cause of action arises *ex contractu*, the plaintiff must sue all the contracting parties, but where it arises *ex delicto*, the plaintiff may sue all or any of the parties, upon each of whom individually a separate trespass attaches, and in *Hume v. Oldacre* (4), which was an action against a huntsman for injuries to the plaintiff's land caused by him and the concourse of people which followed him, it was held that one co-trespasser may be liable for the damage done by him and his co-trespassers.

Applying these general principles of law to the evidence in this case, I make the following findings :

First. That a larger quantity of water than had naturally flowed into Wigle Creek from the lands within its drainage area has been brought down with greater force and from a more extensive area by artificial means constructed originally as drain No. 47 by the former township of Gosfield, and by other artificial means constructed since the division of the said townships in 1887 by the defendant municipality within its township limits, whereby the lands of the respective plaintiffs herein have been injured to a greater extent than they had been by the water naturally flowing down Wigle Creek prior to the construction of this drain No. 47 and subsequent improvements.

Second. That drain number 47 ends and has its outlet at a point about half-way between Pulford's boundary and the concession road, and that the lands of the several plaintiffs (except the above portion of Pulford's) form no part of the drainage area of the said drain No. 47.

Third. That as to the value of the lands damaged, I think it is more satisfactory to take the transactions under

which the sale and purchase of lands have been made by several of these parties within recent years, rather than the widely divergent and conjectural values given by other witnesses. I find that the average price in such actual sales, amounts to about \$34 per acre, which amount I determine to be the fair value of the plaintiff's lands.

Fourth. That the depreciation in value of the lands of the respective plaintiffs, caused by the flooding referred to, is one-half their fair value, which I fix at \$17 per acre.

Evidence was also given of the value of certain maple trees as profitable for a sugar bush, and some witnesses were of the opinion that they had been killed by the water, but other witnesses who had seen some maple trees cut up, and thus had an opinion founded on a post-mortem examination, proved that grubs had been found in their bodies which they thought had poisoned the trees and caused their death. I could not, on such conjectural evidence, find that these maple trees had been killed by water; besides, I think, as a matter of law, these maple trees form part of the soil, and it was not shown that they had been planted by the owners of the property as ornamental timber.

I think the value of the bridges which have been washed away by the excessive water should be measured, not by what a new bridge would cost, but by what the evidence shows to be the cost or value of each of the old bridges; some of these plaintiffs would doubtless prefer an iron or steel bridge, others a very superior wooden bridge, especially if they could force the township to pay its cost, but it is not proper for a jury to assess damages according to the policy of selfish instincts, or to act upon conjectures as to the prospective advantages to certain properties or a particular business, and, therefore, those plaintiffs whose bridges have been damaged or destroyed by the excessive flow of water will be allowed the proper values of the old structures, which will be adjusted with other details on the settlement of the report.

From this judgment the plaintiff appealed to the Court of Appeal, and appeal was argued before Armour, C.J.O..

Osler, Moss and Lister, JJ.A., on the 15th of November, 1900, and is reported in 1 Ontario Law Reports, page 519.

Matthew Wilson, Q.C., and A. H. Clarke, for the appellants.

Mabee, Q.C., for the respondents.

1901, March 2. Armour, C.J.O.:—

The plaintiffs' claims are for damages to their property occasioned by the construction of a drain called in the evidence drain 47, and consequent thereon, and is brought against the Township of Gosfield South alone.

This drain was constructed under by-law number 47 of the Township of Gosfield, founded upon petitions and the report of an engineer, and of an assessment of lands made by him. This by-law was finally passed by the Council of Gosfield on the 28th of June, 1886, and the drain was completed before the coming into force of the Act next hereinafter mentioned.

On the 23rd April, 1887, an Act was passed to take effect from and after the last Monday in December, 1887, constituting all that part of the Township of Gosfield lying north of the centre of the allowance for road between the fifth and sixth concessions, and north-westerly of the centre of the allowance for road between lots numbers 263 and 264 north and south of the Talbot Road, a separate township or corporation under the name of the Corporation of the Township of Gosfield North, and constituting all that part of the township of Gosfield lying south of the centre of the allowance for road between the fifth and sixth concessions, and south-easterly of the allowance for road between lots numbers 263 and 264 north and south of the Talbot Road, a separate township or corporation under the name of the Corporation of the Township of Gosfield South.

And it was by the said Act provided that "all and every the assets and debts of the present municipality of Gosfield shall be divided between the said respective municipalities of Gosfield North on the one hand and Gosfield South on the other in the same manner and by the same proceedings as

nearly as may be, as in the case of a separation of a junior township from a senior township, and so soon as the said debts shall have been divided as aforesaid each of the said municipalities shall be bound to the repayment of the share of the said debts which shall have been so assigned to it as aforesaid as though such share of the said debts had been incurred by such municipalities respectively, each of the townships hereby erected remaining however liable as surety in respect of the share (if any) of the said debts which it is not its duty primarily to pay."

And it was by the said Act further provided that "the provisions of the Consolidated Municipal Act, 1883, and amendments thereto having reference to the case of the separation of a junior from a senior township shall apply to the townships hereby formed, as if such townships had been a union of townships except where it is otherwise herein specifically provided, and for the purpose of applying such provisions the said township of Gosfield North shall be deemed to have been the senior township, and the said township of Gosfield South shall be deemed to have been the junior township, and the corporation of the township of Gosfield North shall be deemed to be a continuation of the said corporation of the township of Gosfield."

Section 55 of the Consolidated Municipal Act, 1883, provided that "after the separation of a county or township from a union each county or township which formed the union shall remain subject to the debts and liabilities of the union as if the same had been contracted or incurred by the respective counties or townships of the union after the dissolution thereof." The result of this division of the township of Gosfield into the townships of Gosfield North and Gosfield South was that part of this drain and of the lands assessed therefor became part of Gosfield North, and part of this drain and of the lands assessed therefor became part of Gosfield South, the drain commencing in Gosfield North and ending in Gosfield South, and the property of the plaintiffs is claimed to have been injured by the construction of this drain and consequent thereon is in Gosfield South.

As soon as this drain was constructed by the township of Gosfield, that township became liable to any persons whose property might be injuriously affected by the construction thereof or consequent thereon, and this liability was a continuing liability, subject to be enforced from time to time as injury might arise. And this was a liability which each of the townships of Gosfield North and Gosfield South upon its erection out of the township of Gosfield remained subject to as if such townships had been a union of townships.

I am of the opinion, therefore, that the plaintiffs should have proceeded against the townships of Gosfield North and Gosfield South jointly, and not against the township of Gosfield South alone: *Campbell v. York and Peel*(5), *Eakins v. Bruce* (6).

This course seems also necessary to be taken in order that the provisions of section 95 of the Municipal Drainage Act may be carried out.

This case must be referred back to the Drainage Referee, with instructions to add the corporation of Gosfield North as party defendant, and to proceed with the reference after having done so.

The costs, including those of this appeal, will be reserved. It is to be hoped that the parties will make use of the evidence already given as far as possible.

Osler, J.A.:—

Sections 1 and 2 of 50 Vic. ch. 51 O. enact that on and after the last Monday in December, 1887, the territory of the then township of Gosfield shall be divided into two parts, the inhabitants of one of which shall constitute a separate township or corporation under the name of Gosfield North, and shall be deemed to be a separate municipality for all purposes in the same manner, and having all the rights, privileges and liabilities appertaining to other townships in the Province; and the inhabitants of the other part were in like manner and extent constituted another separate township or corporation under the name of Gosfield South.

Section 3 enacts that all the assets and debts of existing Gosfield shall be divided between Gosfield N. and Gosfield S. in the same manner, or as nearly as may be, as in the case of a separation of a junior from a senior township. Each is to be liable for the share of the debts assigned to it as though it had incurred them, and is to be surety for the other in respect of the share which it is not primarily liable to pay.

Section 4, after making provision for the election of a council in December, 1887, enacts that the provisions of the Municipal Act of 1883 in reference to the case of the separation of a junior from a senior township shall apply to the townships formed by the Act as if such townships had been a union of townships, except where it is otherwise specifically provided for. Gosfield North is for this purpose deemed to have been the senior township, and Gosfield South the junior township, and Gosfield North is deemed "to be a continuation of the said township of Gosfield."

Section 30 of the Municipal Act of 1883 deals with the disposition of the property of a union of townships on a dissolution; and declares that they shall be jointly interested in the assets of the union, and provides how an arrangement shall be made, and what it shall be as to the assets and debts of the union.

Section 55 is the only other section which bears upon the subject. It provides that after the separation of a township from the union each township which formed the union shall remain subject to the debts and liabilities of the union as if the same had been contracted or incurred by the townships of the union after the dissolution thereof. It would seem, therefore, that the effect of the special Act in this case is to make a different provision as to the debts of the supposed union from that which is made by section 55 of the General Act, for whereas by the latter each separate township remains liable for the debts of the township and its liabilities, leaving the apportionment as between themselves to be settled by agreement or by arbitration, the special Act binds each as principal only to the payment of the share assigned to it, and as surety for the share assigned to the other. It may, indeed, be that

the clause which makes Gosfield North a continuation of the old township of Gosfield leaves the creditors of the latter free to sue it as the only debtor they would look to directly.

Section 3 of the special Act makes no provision for existing liabilities other than the debts of the supposed united townships. These, so far as they are dealt with, are so by section 4, which brings in section 55 of the general Act by applying it to the new townships as if they had been a union of townships, and thus in effect declaring that both shall be subject to the liabilities incurred by the union as if such liabilities had been incurred by each after the dissolution. A union of townships, as a mere territorial expression, signifies only that two surveyed township areas instead of one are under the jurisdiction of a single corporation, and they are, as regards every corporate act done in the whole area, and as regards every corporate right or liability, the same as a single township, so that when the united areas are divided and placed respectively under the jurisdiction of a separate corporation, or when a single township area is divided as in the present case, and similarly placed under the jurisdiction of two corporations instead of one, it seems reasonable to provide that each new corporation shall become answerable for all the debts and liabilities of the former which, in the absence of legislation, would not be the case. What, then, was the situation of old Gosfield regarded as a single township or a union of townships as respects the drain in question—a drain constructed by a single corporation within its own territory—not continued beyond the limits of the municipality in which it was commenced. It might be liable (section 592, Municipal Act) in some form of proceeding for compensation or for damages caused by the construction of the works, and part of the plaintiffs' demand in the action is of this nature, and it would be liable under section 587 to keep the drain in repair. That relief is also asked. The area assessed for construction of the drain must bear all expenses of this kind. The result of dividing old Gosfield into two municipalities is that one part of the drain is in one municipality and the remainder of it in another. Whatever liabilities the old cor-

poration was subject to as regards the drain at the time of the sub-division of its territory are now thrown upon each of the existing corporations, and inasmuch as any damages which may be recovered in respect thereof must be borne by the drainage area, it seems to follow that both corporations should have been parties defendants in the action. It may be that something would have been said in favour of the right to sue North Gosfield alone, as it is a continuation of the former corporation, though I do not see how relief could have been worked out in such an action. I cannot, however, suggest any plausible reason for holding that South Gosfield could be properly sued alone. As regards that part of the plaintiffs' claim which relates to the non-repair of the drain, there are difficulties in dealing with it which I am not at present called upon to solve, and which, perhaps, cannot be solved in the absence of the other township as a defendant. It seems to me to be doubtful whether any section of the present Drainage Act applies to this case, at all events where there has been no report of the engineer fixing the proportion in which the expense of maintenance is to be borne by each municipality. R. S. O. ch. 223, ss. 68, 69, 70.

The case must go back to the Referee in order that the other township may be made a party to the proceedings, and the pleadings amended accordingly. I hope that it may not be found necessary to take all the evidence over again, and that North Gosfield will be content to adopt what has been done so far, adding what further evidence, if any, it may be advised to offer on the issues as they may affect them.

Moss and Lister, JJ.A., concurred.

NOTE.—See next page for judgment of the Referee on reference back.



## BEFORE THE DRAINAGE REFEREE.

WIGLE vs. THE TOWNSHIPS OF GOSFIELD SOUTH AND  
GOSFIELD NORTH.

*Damages—Division of Township—Joint Liability—Enlargement of  
Drain—Sufficient Outlet—Notice under Section 93—Amendment of  
Claim—Refiling—Injunction.*

Where a township after constructing a drain under the drainage clauses of the Municipal Drainage Act was divided into two separate townships, part of the drain and of the lands benefited by it being situated in each of the divided townships, both of the divided townships were held jointly liable for damages to lands caused by the construction of the drain.

The Municipal Drainage Act does not authorize the enlargement and improvement of a drain to a point beyond the limits of the initiating municipality unless the work be continued to a sufficient outlet.

Where townships are jointly liable for damages a notice to one of them is a sufficient compliance with section 93 of the Municipal Drainage Act in order to hold both townships responsible.

The statements of claim filed with the local registrar allowed to be amended and to stand as claims under section 93, and claims as amended ordered to be filed with the County Court clerk.

Plaintiffs held to be entitled to injunction to restrain both defendants from continuing damage to plaintiffs' lands.

Pursuant to the judgment of the Court of Appeal in the actions of Wigle et al. vs. The Township of Gosfield South, reported in the foregoing pages, the township of Gosfield North was added as a party defendant; and the following judgment, which shews the proceedings upon the reference back, was given on the 30th August, 1902, by

J. B. Rankin, K.C., Drainage Referee:—

This is a reference back to the present drainage Referee by the Court of Appeal for Ontario, adding the township of Gosfield North as a party defendant to the proceedings and amending the same accordingly: 1 O. L. R. (1901) p. 519, and the order of the said Court thereon.

This case and seven others with different plaintiffs and the same defendants were consolidated and all tried at the same time as one consolidated case. The evidence taken

before the former Referee was, according to the recommendation of the Court of Appeal and by consent of counsel for the parties, used at the second trial, and this evidence was supplemented by additional evidence given at the trial.

J. P. Mabee, K.C., and W. A. Smith, for plaintiffs.

Matthew Wilson, K.C., and A. H. Clarke, K.C., for Gosfield South.

D. Rogest Davis, for Gosfield North.

The inspection of the locality by the Referee was made pursuant to appointment, and, in company with representatives of the parties, on the 15th day of October, 1901, and the trial took place at Sandwich on the 31st day of October, 1st and 2nd days of November, and the 14th and 15th days of February, 1902, when judgment was reserved in order to obtain a copy of the additional evidence given at the new trial, and this evidence having been obtained and all the evidence put in being carefully read and considered, I now make my report and decision thereon. The case was necessarily protracted by reason of the eight cases being tried upon the same general evidence; the evidence on damages sustained by each of the plaintiffs being necessarily independent of that of the others.

There are certain points on which there is little or no conflict of evidence and upon which the witnesses of both parties practically agree, and I find the same fully and satisfactorily established as facts. These are as follows:

1. The small extent of territory formerly trending and having a natural fall towards Wigle Creek before the construction of drainage work No. 47 by the township of Gosfield;

2. The natural trend of the land within the drainage area of No. 47 before its construction being westerly, and the surface water therefrom having its natural outlet into the head of the Canard River, and ultimately into the Detroit River, into which the Canard empties;

3. Prior to the construction of No. 47, the surface water which flowed into the Canard River and that which flowed into Wigle Creek had neither natural nor artificial connection of any kind;

4. That a small artificial drain had been constructed prior to the construction of No. 47 in part of the course afterwards taken by No. 47, and leading into Wigle Creek, but the head of this artificial drain did not extend north far enough to connect in any way with the drainage system then in existence leading the surface water westerly into the Canard River;

5. That the condition of the level of the lake has changed and has lowered between one and two feet within the last twelve or fifteen years.

Prior to the construction of No. 47 by Gosfield, the territory then drained westerly into the Canard River consisted largely of marsh lands known in the locality and called in the evidence the Cottam Marsh. These lands were, prior to the drainage, practically useless, and numerous drains upon the different concession roads, and in addition a more effective drain known as No. 5, were constructed by the township of Gosfield to carry the water off these lands westerly to the Canard River, and this system gave relief to the lands in the Cottam Marsh and other lands adjoining it in Gosfield.

The Canard River has its source in the township of Colchester North, which lies immediately west of Gosfield, and the system of drainage in Gosfield conveyed the surface waters across Colchester and Gosfield townline and into the head of the river.

A petition was prepared, exhibit 1, dated 10th October, 1885, asking for the construction of drains to be constructed under the Consolidated Municipal Act of 1883; one on or near the division road from No. 5 drain south to Cherry Creek to a sufficient outlet; a second on the sideroad between lots 6 and 7 on the western division sideroad from the road in the rear of the Talbot road lots south to Wigle Creek; and along the creek to a sufficient outlet; and a third on the townline between Gosfield and Colchester from Essex Centre south to the sixth concession road, and thence on or near the townline, as the engineer may see most advisable, to Bank's Creek, and along the creek to a sufficient outlet; the said drains being required to drain the following lots: Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, concessions 5, 6, 7, 8 and 9; and lots 261,

262, 263, 264, 265 and 266 on the south side of the Talbot road in the township of Gosfield. The council of Gosfield employed James S. Laird, provincial land surveyor, to prepare a report, plans, estimate and assessment upon this petition. The engineer's estimate of the cost of his proposed work, including all expenses, was \$25,828. A by-law was passed adopting the report and to execute the work described (exhibit 2), and this system of drainage asked for by the petition was constructed by Gosfield. Drainage work No. 47 is a part of this system and was constructed along the sideroad between lots 6 and 7 as provided for by the by-law. With the other two branches of the system we have very little to do in considering the effect produced upon the plaintiff's lands.

I find upon the evidence that the lands of the plaintiffs were, prior to the construction of No. 47, firm, solid bottom lands on both sides of the Wigle Creek, with several springs rising out of the natural or second banks and emptying into the creek proper. These flats vary in width from five to twenty rods and were used by the owners as pasture lands. And I further find that the lands produced good pasture to the respective owners. This applies to the creek flats to within about half a mile of the outlet of Wigle Creek, and throughout this half mile the lands were soft and mostly used for the cultivation of rice and also for pasture.

After the construction of No. 47, the flow of water to the south was greatly increased and No. 47 became enlarged by the action of the water to such an extent that land was washed away and down stream. Fences and bridges were undermined and carried away, and the depth of the drain was increased by the washing out of the bottom to such an extent that the drain became wider and deeper, particularly through the land owned by the plaintiff Pulford, where nearly an acre of his land was completely washed away and the whole carried down and deposited upon the lands of the other plaintiffs. This washout was gradual and has continued ever since the construction of No. 47 to the present time, and such is the result of the continuous and gradual enlargement of the drain.

Shortly after the construction of No. 47 some of the plaintiffs and others began to complain. They sent in notices to the council of Gosfield South, after the division of the township of Gosfield into Gosfield North and South, and some of these claims were adjusted by payment of money and allowance of statute labor.

On May 24th, 1888, Prideau Wigle, one of the plaintiffs, complained to the council of Gosfield South of the water from Tap Drain No. 47 overflowing and damaging his land, and the council of Gosfield South by resolution instructed James S. Laird, the same engineer who made the report for construction, to make an examination of the Wigle Creek and report at the next meeting. On December 15th, 1888, the plans and specifications of the Wigle Creek as made by James S. Laird, Provincial land surveyor, were presented to the council for their consideration; and "on motion by Mr. Shipley, seconded by Mr. Shanks, the same were laid over till the next meeting, and the reeve and deputy-reeve were appointed to see Mr. Laird to ascertain what lands would be benefited and what portion would be levied on roads. Carried."

The engineer, in his report, says: "I have laid out a drain sufficient in size to convey the water from the said tap drain to a good and sufficient outlet without danger of causing damage to the adjacent low-lying lands, etc. My estimate of the cost of the work, including incidental expenses, is \$1,905. This will cover the cost of straightening the present channel. (Exhibit 17.)"

On March 30th, 1889, at a meeting of the council of Gosfield South, it was moved by Mr. Shipley, seconded by Mr. Eade, that the deputy-reeve be appointed to wait on the parties interested in the Wigle Creek drain in order to effect a settlement, and, at the request of Mr. Peterson, Mr. Shipley was added in the motion. (Exhibit 31.)

On April 17th, 1889, Len Allen complained to the council of Gosfield South of the water in tap drain No. 47 washing away the banks and undermining his fence. Moved by Mr. Shipley, seconded by Mr. Eade, that the municipality, jointly-

with Mr. Allen and others, employ Mr. Laird, while in the locality, to locate the line and amount of land, if any, caved in the said drain belonging to Allen. (Exhibit 31.)

In Exhibit 31, containing the proceedings of the council of Gosfield South between November 24th, 1888, and March 24th, 1897, and on the date July 29th, 1893, the following minute appears: "William Newman, C.E., presented the plans, specifications, estimates, etc., with a report on Wigle Creek drain, as authorized by the council, which was read; also a duplicate for Gosfield North, and after the report was read the clerk was ordered to serve a copy on the reeve of Gosfield North."

The report referred to in the above resolution is dated July 28th, 1893, and is a report on the examination of the watercourse known as Wigle Creek in the township of Gosfield South, and provides for raising the sum of \$5,906 for the work recommended by the report, of which sum \$3,214.70 is assessed on lands and roads in Gosfield South, and \$2,691.30 on lands and roads in Gosfield North. (Exhibit 19.)

In his report the engineer states: "I measured the size of the west branch near the school house on the western division road, and found it to be 14 feet deep and 25 feet wide at the bottom and 50 feet wide at the top, and the bank still caving in. I find the amount of land the waters of which find an outlet through the Wigle Creek to be about 10,000 acres. The greater portion of the land has its outlet through the west branch. A considerable amount of the land drained through the west branch of No. 47 into Wigle Creek is what is known as Cottam Plains, a large marsh lying to the south and west of the village of Cottam. The natural outlet for these plains is to the westward into the River Canard, and thence into Detroit River, and to make use of this outlet to drain the plains some three or four tap drains were dug emptying into the head waters of the Canard River. But six or eight years ago there was an agitation among the people living further down the River Canard to have that stream cleared out, as the improved drainage of the lands around the head of the stream were causing the river to overflow its banks

during high water. To avoid this being brought into the River Canard drainage scheme, the people owning the Cotnam Plains and adjoining lands had two large cut-off or intercepting drains constructed, one on the west townline and one on the west division road (No. 47)." And again, further on, the engineer says: "But since the greater portion of the lands have been cleared, ditches, under-drains, etc., have been constructed in almost every conceivable direction, and the large intercepting drains have been constructed; the waters caused by the spring rains and the melting of the winter snow now run off much more rapidly, carrying with them a vast amount of sediment, driftwood, etc. As a proof of this, I would direct your attention to the condition of things on the west branch of drain No. 47, where the current has in many places cut down the road or the fences on the adjoining farms until now we have a drain 40 to 50 feet wide and 12 to 15 feet deep. The earth thus washed out is carried down a rapid current to the end of the drain, but when it reaches the creek flats where they spread out, it meets with logs, brush, etc., which check its velocity, and this causes the sediment to settle on the lands of the whole creek flats. This process has been carried on to such an extent that the pasture lands of the creek flats are covered several inches deep with sediment, and every heavy rain during the summer brings down a fresh supply of clay, which is deposited on the pasture to such an extent that the pasture is almost worthless. There are about 30 to 35 acres of these creek flats which are damaged by the sediment, etc."

A copy of this report was duly served on Gosfield North, and that township served Gosfield South with a notice of appeal from the report so served. The notice of appeal was not put in, and the grounds of appeal are not given in the evidence. Upon receiving the notice of appeal the council of Gosfield South passed a resolution on September 30th, 1893, in the words following:—

"That this council does not desire the work on Wigle Creek to proceed any further."

In my opinion, had this report been adopted, and the work proposed by it properly executed, the result would have been

most beneficial to the lands of the plaintiffs by relieving them from the water and wash so fully and fairly set out in the body of this report, and these actions would never have been brought.

On November 25th, 1893, Theodore Wigle, one of the plaintiffs, appeared before the council of Gosfield South and claimed the sum of \$40 for cleaning out a portion of the Wigle Creek amounting to \$40, and requested the council of Gosfield South to pay one-half, and he would look to the council of Gosfield North for the balance. It was then "moved by the deputy-reeve, seconded by Mr. Orton, that no more money be expended on this drain by the council until a settlement was made with the Gosfield North council. Carried."

After the division of the township of Gosfield into Gosfield North and Gosfield South, both townships repaired and improved the different drains in their respective townships leading into No. 47; the township of Gosfield North to a much greater extent than the township of Gosfield South. The difficulty with reference to improving and extending drain No. 47 arose by reason of the absence of a united effort on the part of the councils of the two townships. This continued until 1897, when Gosfield North undertook so-called repairs of No. 47 within its own boundaries, and continued the same about 192 rods into Gosfield South, as shewn by the report of James S. Laird to the reeve and council of Gosfield North, dated August 7th, 1897, and the profile of what is called the western division sideroad drain, which is the same as No. 47, and the work under this report was carried out by Gosfield North. (See Exhibit 12.)

In his report the engineer states: "I have examined the western sideroad drain and the 7th concession road drain and beg to report thereon as follows: I found these drains greatly filled up with earth from the sides of the drains and with sediment from the roads and adjoining lands, and in very great need of cleaning out and improving. I also found it necessary, under section 75 of the Drainage Act 1894, to clean out and improve and enlarge the ditch on the easterly



side of the Cottam road, from the south river road to the seventh concession road, in order to prevent the water from flooding lots 9 and 10 in the seventh concession of your township, and to give a short cut for the water from lots 269 and 270 to the seventh concession road drain. I would therefore recommend that they be all cleared out and improved in accordance with the annexed profile and specifications." The work to be done under this report was estimated to cost \$2,137.55.

Comparing the bottom width of drain No. 47 as constructed with the specifications for the improvement provided for by Exhibit 12, it will be seen that the bottom width of the drain was increased by two feet throughout its whole course in Gosfield North and across the fifth concession in Gosfield South.

Since this work was done by Gosfield North, repairs were made in 1899, 1900 and 1902 to No. 5, as shewn by Exhibits M and L. Nothing, however, was done to continue the repairs and improvement to the original outlet of drain 47 in Gosfield South, and the work done in Gosfield North in drain 47, and in the laterals already mentioned leading into it necessarily increased the flow of water down No. 47.

I therefore find and report that by the construction of No. 47, and by reason of its not being carried to a sufficient outlet according to the prayer of the petition, the surface water from the Cottam Plains and other adjoining lands was carried in a course out of the natural flow and cast, with the wash of earth from the sides and bottom of the drainage work, upon the plaintiffs' lands for which both municipalities are jointly liable.

I also find and report that Gosfield North in the year 1897 not only repaired but also enlarged and improved drain No. 47 from the head of the drain to a point 192 rods south of the townline and there stopped the work. There was no authority under the statute for doing this work, and it should have been carried south to a sufficient outlet.

I also find and report that prior to the year 1897 the drain No. 47 in Gosfield North was in a very bad state of repair,

and this failure to perform its statutory duty by Gosfield North had the effect of increasing the deposit of earth and sediment upon the lands of the plaintiffs to their injury.

I also find and report that drain No. 47 in Gosfield South was out of repair; that no repairs were made by Gosfield South to that part of the drain within its own limits, and, as a result of such neglect to repair, the improvement above on the main drain and also on the laterals had the effect of washing out the earth throughout the portion of the drain south of the end of the improvement by Gosfield North and increased the deposit of earth and sediment brought down upon the lands of the plaintiffs and to their injury. I am therefore of the opinion that there was negligence established by the evidence against both Gosfield North and Gosfield South.

In *Young v. Tucker* (1) Mr. Justice Lister says: "The right of the defendant to drain his land by ditches is undoubted, but with this right is the correlative obligation to so construct them as to conduct the water which may be carried thereby to a good and sufficient outlet, so that the water which may be discharged therefrom will do no injury to other proprietors. Anything short of this must, I think, be regarded as negligence for which the defendant would be answerable. The governing principle in such cases as this is, that one cannot prevent injury to his own property by transferring it to his neighbor's property." At page 172 the same learned Judge says: "The evidence shows that the ditch conducted and discharged into the swale on Campbell's land a very considerable volume of water, which would not otherwise have come there; that the swale or marsh was not a proper and sufficient outlet for the water so brought down and discharged there, and that the plaintiffs were injured by the water from the swale overflowing and flooding their lands. What the defendant did was negligently done, and he is, therefore, answerable for the consequences of that negligence."

I am not overlooking the law as laid down in *Hiles v. Ellice* (2). This case is clearly distinguishable, for although the engineer designed an outlet which seemed to be sufficient

(1) (1899), 1 O. L. R. p. 162, at p. 169. (2) 23 S. C. R. p. 429.

to carry off the waters from the lands proposed to be drained, yet within two years or less after the drainage work was constructed the same engineer reports the expenditure of \$1,905 in order to reach a proper and sufficient outlet, and this expenditure was not made nor was any part of the proposed work done. See also *Gahan v. Mersea* (3). As to 'non-repair' see *Crawford v. Ellice* (4), *Williams v. Raleigh* (5).

Assuming that the claim of the respective plaintiffs is for damage done by the construction of the drainage works or consequent thereon under section 93 of the Municipal Drainage Act, the township of Gosfield North was added as a party defendant on August 13th, 1901, and it is contended by counsel for that township that it cannot be held liable, as no notice was served and filed as required by section 93. The same argument is also presented on behalf of Gosfield South.

The notices given by the plaintiffs are: July 24th, 1893, Exhibit 25; September 30th, 1893, Exhibit 8; November 11th, 1893, Exhibit 15; November 15th, 1893, Exhibit 14; November 15th, 1893, Exhibit 15; November 24th, 1893, Exhibit 13, and March 27th, 1897, Exhibit 18, all of which call the attention of the councils of Gosfield North and Gosfield South to the condition of No. 47, and the effect produced on the plaintiffs' lands by the water and earth from the said drain, and as the townships are jointly liable a notice to one of the councils was sufficient to hold them both responsible.

The township of Gosfield was divided into Gosfield North and Gosfield South by an Act of the Local Legislature passed on the 23rd April, 1887, and to take effect from and after the last Monday in December, 1887. As stated by the Chief Justice of Ontario when this case was before the Court of Appeal (6): "The result of this division of the township of Gosfield into the two townships of Gosfield North and Gosfield South was that part of this drain and the lands assessed therefor became part of Gosfield North and part of Gosfield South, the drain commencing in Gosfield North and ending in Gosfield South." At page 523 Mr. Justice Osler says:

(3) *Clarke & Scully*, p. 140.

(4) 26 O. A. R. p. 484.

(5) (1893) A. C. 540.

(6) 1 O. L.R. 319, at p. 521.

"The area assessed for the construction of the drain must bear all expense of this kind. The result of dividing old Gosfield into two municipalities is that one part of the drain is in one municipality and the remainder of it in another." Taking these two statements together we have one drainage area lying in two different municipalities, and this drainage area alone received the advantage from the construction of No. 47, and, therefore, apart from the liability of the general funds as provided for by section 95, sub-section 2, should be made liable for the damages occasioned by the construction of the drain, or consequent thereon:" *Broughton vs. Gray* (7).

Notice after notice was given to the council of Gosfield North, and two notices were given to Gosfield South, and while action was taken in some instances looking towards remedying the defective construction of the drain and carrying the waters brought into it in ever increasing volume and speed by improvements made in its lateral or branch drains to a sufficient outlet, yet all such endeavours were rendered fruitless owing to the want of harmony between the two councils of the two townships. Each council was anxious to protect the ratepayers within its jurisdiction.

I have referred to the conduct of the councils of the two townships to show that neither of them was misled by the proceedings afterwards taken by the plaintiffs in bringing their actions. The question of damages was constantly present in their minds, and at times in a very acute form. The damage was a continuing liability, and I, therefore, in pursuance of the provisions of sub-section 2 of section 89, and of the construction put upon section 93, sub-section 3 (in *Tindell vs. Ellice* (8), and in *Thackeray v. Raleigh* (9), allow the statements of claim to be amended, and to stand as claims under the provisions of section 93. And lest there should be any difficulty by reason of the statements of claim being filed with the local registrar, whereas the statute provides for the claim being filed with the clerk of the County Court, I now

(7) 27 S. C. R. 495, at p. 500.      (9) 25 O. A. R. 226.

(8) *Clarke & Scully's Drainage Cases*, p. 247.

order and direct that the claims as amended be now filed with the clerk of the County Court of the County of Essex.

In so far as the inspection is concerned, and the effect given to it, I report: That from the inspection it was apparent, from the extent of the washout of the drainage work above and in front of the plaintiff Pulford's lands, that the force of the water had carried the earth down stream and deposited it on the flats of the creek to a depth of between eighteen and twenty inches, and had the effect apparently of choking up the springs in the flats, and rendering a considerable portion of the land around them boggy and useless. The timber is partly decayed, and there are no bridges along the course of the creek. Upon these several matters the inspection corroborates the evidence for plaintiffs.

I treat the land and timber together as land, and give damages in favour of the plaintiffs upon that basis. It is an impossibility to assess the damages with any very great degree of accuracy; but in order to save expense to the parties I shall follow the principle laid down in *Stalker v. Dunwich* (10), followed as it is in *Turner v. Burns* (11).

I find that one acre of Pulford's land has been completely washed away, leaving his farm cut in two pieces by such washout. This land, I find from the evidence, was worth \$100, and the bridge now required will cost at least \$75.

I find that the value of the flat land, to within about one-half mile of Lake Erie, before the construction of Drain No. 47, was worth \$40 per acre, and that it has been permanently injured to the extent of one-half its former value; and through part of the land of the plaintiffs Alvin Wigle and Theodore Wigle the rice pasture has been so injured to the extent of \$2.00 per acre.

I assess the damages as follows:—

Edwin A. Pulford, land, 1 acre, \$100; bridge, \$75; total, \$175. Jonas Wigle, land,  $2\frac{1}{4}$  acres, \$45. Prideau Wigle, land, 20 acres, \$400; bridge, \$50; fences, \$25; total, \$475. Joshua Adams, land, 5 acres, \$100; fences, \$30; total, \$130. Phillip Wigle, land,  $4\frac{1}{2}$  acres, \$90. Alvin Wigle, land, 10 acres, \$200,

rice land, 20 acres, \$40; total, \$240. Theodore Wigle, land, 8 acres, \$160; rice land, 35 acres, \$70; total, \$230. Mary H. Rae, land, 14 acres, \$280; bridge, \$50; total, \$330.

The plaintiffs are further entitled to an injunction to restrain both defendants from continuing the damage to the lands of the plaintiffs; the injunction not to issue for six months in order to enable the defendants to take proper steps to stop any further injury.

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## COURT OF APPEAL, ONTARIO.

### TOWNSHIPS OF ADELAIDE AND WARWICK VS. TOWNSHIP OF METCALFE.

*Drainage Act—Amendment of Engineer's Report—Jurisdiction of Referee—Appeal—Court of Appeal—R. S. O. ch. 226, secs. 89, 90.*

The Drainage Referee cannot, under section 89 of the Drainage Act, R. S. O. ch. 226, upon the admission of the initiating township that the report appealed from is defective, refer it back, against the wishes of the appealing townships, to the engineer for amendment.

Judgment of the Drainage Referee reversed.

An order assuming to refer back a report is not an interlocutory order within the meaning of section 90 of the Drainage Act, R. S. O. ch. 226, and an appeal lies to the Court of Appeal against it.

This was an appeal by the townships of Adelaide and Warwick from an order of the Drainage Referee.

The following judgment was delivered on the 25th of January, 1899, by

Thomas Hodgins, Q.C., Drainage Referee.

This is an application by the respondent township to refer back to the engineer his report on the proposed drainage scheme, counsel admitting that the report contains certain technical and other defects which should be rectified before the substantial questions raised by the appeal of the appellant townships should be tried. The engineer consents, through counsel for the respondents, to the proposed reference back;

but the appellants object, and contend that the trial of the appeal should proceed.

The Drainage Act gives very large judicial powers to the Referee, and provides that "in respect to all proceedings before him, or which may come before him under the provisions of this Act, or any former Act relating to drainage works, he shall have the powers of a Judge of the High Court of Justice," and then apparently for greater certainty, but not so as to restrict the generality of that co-ordinate power, certain specified powers are included. Then the Act further provides that he may amend notices for compensation or damages, and of all other notices and proceedings, and amend and correct provisional by-laws, and correct errors or supply omissions in the proceedings. He may also summon to his aid engineers, surveyors, or other experts without limiting in what particular cases or matters this latter jurisdiction may be exercised; and he is to regulate and direct all matters incident to the hearing, trial and decision of the matters before him, so as to do complete justice between the parties (s. 89). And in the case of by-laws for the repair of any drainage work under ss. 68, 69, or 70 of the Act he may alter, amend or confirm such by-law, or may direct that the same shall not be passed, as to him may seem just (s. 71). Some of these powers are exceptional, and not exercisable by other tribunals.

Among the powers of a Judge of the High Court is the power which has been often exercised of referring back the report of a Master or Official Referee where the respondent in an appeal therefrom consents, or where the Court finds certain defects or erroneous procedure. See *Kilbee v. Sneyd* (1), and other cases. A similar practice prevails in the Courts of the United States, as illustrated in the case of *Parsons v. Suydam* (2), where it was held that a defect in a Referee's report was no reason for reversing the judgment, "because such a defect is the subject of a motion to direct a further and more specific return," and the report in that case was referred back. See also *Rogers v. Voorhees* (3).

(1) 2 Moll. 196.

(2) 3 E. D. Smith, N. Y., at p. 280.

(3) 124 Ind. 469.

So the power "to summon to his aid engineers, surveyors, or other experts," would warrant the Referee referring the engineer's report in this case, or other questions, either to the same or some other engineer to make such investigations or to revise or re-cast the computations, or estimates or schedules to the report as would aid and enable the Referee "to do complete justice between the parties." Practically by referring back this report I call to my aid this engineer to put it in such a shape as will enable me to obey the legislative mandate. And where it may become necessary to order an amendment of the engineer's report with his consent, it would be the proper procedure to refer it back to him to carry out the details of such order, and to append his written consent. It seems to follow that a similar procedure would be proper when both respondents and their engineer admit certain technical or other defects in the report the correction of which would be ordered either before or after the trial of the substantial questions raised by the appeal.

But a further illustration of the exceptional and large judicial powers of the Referee in drainage cases will be found in *Hiles v. Ellice* (4), where the Supreme Court held that under the Drainage Act "the Referee has the fullest powers of amendment which are possessed by the High Court itself, and that, upon the reference of an action to him by the Court or a Judge, he has full power to deal with the case as he thinks fit; and to make without any application of any of the parties all such amendments as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining of the rights and interests of the respective parties, and the real question in controversy between them, and best calculated to secure the giving of judgment according to the very right and justice of the case; and so, if necessary to convert the claim for damages as set forth in the statement of claim, if that should be filed before the reference to the Referee, into a claim for damages under section 591 of the Act of 1883 (now section 93), as consequential upon the construction of a work authorized by a by-law duly



passed, and to cause his adjudication thereon to be entered of record for the plaintiff for his damages, if any, awarded to him as damages recovered under the section."

Under these statutory and judicial declarations of the jurisdiction and powers of the Referee, it seems clear that the Court for the trial of drainage cases is constituted a Forum Domesticum to adjudicate upon all questions and proceedings affecting municipal drainage schemes; and in that view effect should be given to the present application, and in obedience to the maxim which Lord Mansfield applied in *Rex v. Phillips* (5), when he said: "This seems to be the true way to come at justice; and what we therefore ought to do; for the true text is *boni judicis est ampliari justiciam* (not jurisdictionem, as it has been often cited)."

Having in other drainage cases referred back engineers' reports, and in some cases have thereby saved municipalities the costs of trials for the rectification of technical defects and other errors, I do the same here.

The respondents are entitled to the costs of this application, and of the postponement of the trials in any event.

The appeal from this judgment to the Court of Appeal was argued before Osler, MacLennan, Moss and Lister, J.J.A., on the 6th of December, 1899.

Aylesworth, J.C., for the appellants.

J. Folinsbee, for the respondents.

January 16th, 1900. The judgment of the Court, reported 27 O. A. R. p. 92, was delivered by

Lister, J.A.:—

This is an appeal by the townships of Adelaide and Warwick from orders of the Drainage Referee, made upon the application of the respondent township referring back to the engineer of the respondent township, the report, plans, specifications, assessments and estimates, made and prepared by

him for the respondent township in respect of proposed repairs and improvements of the Hardy Creek drain.

Upon the report of its engineer, the respondent township, under the authority of the Municipal Drainage Act, initiated a scheme for repairing and improving a drain known as "the Hardy Creek drain."

The report found that certain lands in the appellant townships (being the higher or upper townships) would be beneficially affected by the contemplated works, and such lands were thereby assessed for a proportion of the cost of the proposed work as for outlet liability. A copy of the report, etc., was duly served on the appellant townships, and they duly appealed to the Referee from such report, etc., upon the ground, amongst others:

"That all the lands and roads assessed for the said works in the township of Adelaide and Warwick, are assessed for outlet liability, and the drain in question does not form an outlet for the waters from said lands within the meaning of the said Act, and the said work when completed will not, within the meaning of the said Act, form an outlet or improved outlet for the waters from off said lands, and the lands and roads in Adelaide and Warwick will not receive any benefit whatever from the construction of the said work."

The hearing of the appeal was fixed by the Referee for the 20th December, 1898, but was subsequently postponed by him to the 31st of January, 1899.

On the 25th of January, 1899, the Referee, on the application of counsel for the respondent township, made the order appealed against, the material portions of which are as follows:

"Upon the application of the above named respondents, and upon hearing read the proceedings, including the notices of appeal herein, and upon hearing what was alleged by counsel for the respective appellants and the said respondents, and upon the said respondents admitting that the said report, specifications and assessments and estimates appealed from, require amendment, and after having directed that the appellants and respondents should be notified not to subpoena

witnesses or prepare for trial on the 31st day of January, instant, being the day fixed for trial, but that any witnesses subpoenaed should be stopped or prevented from attending trial :

“ It is ordered that the said report, plans, specifications, assessments, and estimates, appealed from herein, be referred back to the said engineer, W. M. Manigault, for review or amendment, as to him may seem proper, and that the same, when so amended, be served upon the respective appellants, or that the appellants' copies thereof be accordingly amended by the said engineer; and that the respective appellants have liberty at any time within thirty days after the service aforesaid, or other amendment of the said report, plans, specifications, assessments and estimates, within which to amend their grounds of appeal, or put in such grounds of appeal as they may be advised, from the said report, plans, specifications, assessments, and estimates, as filed and served herein, if they so desire.”

And by the same order he again postponed the hearing of the appeal to a day to be thereafter named by him; and from this order the appellants appeal, mainly upon the ground that the Referee had no jurisdiction to make the order. The appeals were, by order of the Referee, consolidated.

Clearly the order was intended to be an authorization to the engineer to amend his report by changing the assessment of the lands in the appellant townships from outlet to injuring or benefit liability, or both, and the question is, had he jurisdiction to make the order? I do not think he had. Subsec. 3 of sec. 89, which is the part of the Municipal Drainage Act relating to the amendment of engineers' reports made in respect of work initiated under the Act, provides that “ the Referee shall have power, subject to appeal as hereinafter provided, to determine the validity of all petitions, resolutions, reports, provisional or other by-laws, whether objections thereto have been stated as grounds of appeal to him or not, and to amend and correct any provisional by-law in question; and, with the engineer's consent and upon evidence given, to amend the report in such manner as may be deemed just, and

upon such terms as may be deemed proper for the protection of all parties interested. . . .”

In the absence of express legislative authority, the Referee has no power to refer back for amendment or review a report made by an engineer in respect of a drainage work initiated under the Act. Jurisdiction is conferred upon the Referee, with the consent of the engineer, and upon evidence given, to amend a report. The Act contains no provision which authorizes the Referee to delegate this jurisdiction; it must, therefore, be exercised by the Referee, and by him only.

I cannot agree with the contention of the learned counsel for the respondent, that the order in question was interlocutory within the meaning of sub-section 2 of section 89, and, therefore, under section 90 of the Act, not the subject of an appeal to this Court. It seems to me that it is not an interlocutory proceeding under that sub-section, but an order assuming to authorize the engineer to do what the Referee alone could do under sub-section 3.

The appeal must be allowed with costs and the order discharged.

## COURT OF APPEAL, ONTARIO

TOWNSHIP OF COLCHESTER NORTH vs. TOWNSHIP OF  
GOSFIELD NORTH.

*Report of Engineer—Failure to Take Oath—Amendment of Report—  
R. S. O. ch. 226, secs. 55, 75.*

Taking the oath prescribed in section 5 of the Municipal Drainage Act, R. S. O. ch. 226, is an essential prerequisite to the exercise of jurisdiction by the engineer under section 75 of that Act. While an appeal to the Drainage Referee against a report is pending, the initiating municipality cannot refer back the report to the engineer for amendment. Judgment of the Drainage Referee reversed.

This was an appeal by the township of Colchester North from the judgment of the Drainage Referee.

The following judgment was delivered on the 28th of January, 1899, by

Thomas Hodgins, Q.C., Drainage Referee:—

It is objected that the engineer's oath of office was not filed with the clerk at the time it was sworn to. Assuming for the purpose of the argument that it was not, I think the provision in section 5 comes within the same rule as that to which I gave effect in *Thackery vs. Raleigh* (1), and afterwards affirmed by the Court of Appeal (2), that a clause which contains mere matter of direction is directory and not imperative, and that it is sufficient if such directory clause is obeyed or fulfilled substantially.

Then, as to the objection that the first report of the engineer was not adopted by the Council, but referred back to him for amendment, I think, in view of the statutory responsibility of the Council under the Drainage Acts, it is within their discretion to adopt, reject or refer back the engineer's report on a proposed drainage scheme. The Council has to consider the extent of the area assessed for the cost of the construction of the necessary works, and be otherwise responsible

(1) C. & S. Drainage Cases, 328.

(2) 25 A. R. 228.

for a clearly defined policy as to what is reasonable and proper under the circumstances, and it was clearly within their right to refer the report back to the engineer with such suggestions or directions as they might consider proper.

Another objection is that the petition under which the Council initiated these proceedings had not the signatures of a majority of the owners within the prescribed area. The statute in both sub-section 3 of section 3 and section 75 authorizes the Council to initiate proceedings under such sections without the petition required by sub-section 1 of section 3. It is, however, reasonable and cautionary on the part of parties interested in, or whose property is injuriously affected by a drainage work, to make such representations to the Council as may prevent applications for writs of mandamus under section 73, and actions for damages. But in the absence of such it is clearly within the legislative authority of a council to initiate such proceedings as may be proper under either of the sections above referred to, and without the petition required by sub-section 1 of section 3.

It is further contended that the respondent township had no right to change the course of a portion of the drain by cutting a new channel for it along the rear road to the Batton side road drain, and widening the latter so as to give it sufficient capacity to carry the extra water brought into it from the upper drains, and discharge the same into the Canard River.

Section 75 of the Act provides that whenever for the better maintenance (i.e., the preservation and keeping in repair) of a drainage work, it is deemed expedient to change the course of, make a new outlet for, or extend or alter such drainage work, the council of the municipality or of any of the municipalities whose duty it is to maintain the said drainage work, may, without the petition required by section 3, but on the report of an engineer, undertake and complete such change of course, new outlet extension or alteration.

I think the case of *Stonehouse v. Plympton* (3), and other cases, dispose of this contention.

The appeal from this judgment to the Court of Appeal was argued before Osler, MacLennan, Moss and Lister, JJ.A., on the 18th and 19th of January, 1900.

Britton, Q.C., and Langton, Q.C., for the appellants.

A H. Clarke, for the respondents.

March 27th, 1900. The judgment of the Court, reported 27 O. A. R. 281, was delivered by

Lister, J.A.:—

This is an appeal by the township of Colchester North against the judgment of the Drainage Referee, dismissing their appeal from the report, etc., of Mr. Newman, C.E., the respondents' engineer, in respect of the cleaning out and enlarging of the drain known as No. 15, or the 9th concession drain, Gosfield North.

The respondents, claiming to act under section 75 of the Drainage Act, initiated proceedings for the cleaning out and enlargement of the drain, and the making of a new outlet therefor in the appellant township, and on the 12th March, 1898, appointed Mr. Newman to prepare a report, plans, specifications and estimates, in respect of the contemplated work, and to make an assessment.

The drain had been constructed by Gosfield under the authority of a local assessment by-law, duly passed on the 28th of August, 1880. It commenced at the south-easterly angle of the rear road and north side of the 9th concession road in Gosfield and extended to the west side of the town line between Gosfield North and Colchester North, thence along the west side of the town line to the south-west angle of lot 21 in the 10th concession of Colchester North, and thence westerly in Colchester North to the Canard River, in that township, where it discharged its waters.

The engineer, before entering upon the discharge of the duty which he had been appointed by the council to perform, subscribed and took the oath prescribed by section 5 of the Drainage Act, and, as appears by the jurat, this was done on the 20th of April, 1898.

The engineer's report with plans, etc., were, on the 12th of May, 1898, laid before the council of Gosfield North, and approved. The report set forth that the drain in question and its branch, also in Gosfield North, were not deep enough nor of sufficient capacity to properly drain the lands they were intended to drain; that they were badly filled up with sediment, etc., and were in need of repairing and enlarging, and that the outlet was insufficient to carry off the waters brought down by the drains; and it recommended that, in order to better maintain the drain and its branch and to prevent damage to the lands and roads affected thereby, they should be cleaned out and enlarged in accordance with the plans, etc., of the proposed improvements which accompanied the report; and it further recommended that a new outlet should be made, commencing on the westerly side of the town line between Gosfield North and Colchester North, opposite the 9th concession road in Gosfield North, thence westerly along the western side of the town line to the rear road, and thence westerly along the north side of the rear road to the Canard River, and for the cost of the proposed work, lands and roads in Gosfield North were assessed at the sum of \$3,272, and lands and roads in Colchester North at the sum of \$280.

The scheme thus recommended involved the enlargement and user by Gosfield North of a drain along the rear road, and entirely within the limits of Colchester North, constructed by that township under a local assessment by-law at the cost of its land and roads, and unconnected with drain No. 15.

A by-law in the statutory form to authorize the work thereby recommended and to provide for its cost was provisionally passed, and a copy of the report, etc., was duly served on the appellants, who appealed therefrom to the Drainage Referee.

On the 22nd of August, 1898, and while the appeal made against the report was pending, the respondents adopted the following resolution: "Moved by Henry Barlow, seconded by James Newman, that the engineer's report for the repair



of the 9th concession drain be referred back to the engineer to be amended according to instructions from the township solicitor. Carried."

On the 12th of September, 1898, at a meeting of council at Gosfield North, a resolution in the following words was adopted: "Moved by James Newman, seconded by A. J. Scratch, that the repair of the 9th concession drain under the report of William Newman be abandoned, and the clerk notify the clerk of Colchester North. Carried." And subsequently at that meeting, the report which forms the subject of the present appeal was laid before the council and adopted. Attached to it was the oath which had been taken by the engineer before entering upon the duty which resulted in the former report, the work under which had, by the resolution of the 12th of September, been abandoned.

A copy of the second report (which differs in some respects from the first) was served upon the appellants, and they appealed therefrom to the Drainage Referee, who gave judgment dismissing their appeal, and from that judgment the appellants now appeal.

It is admitted that the engineer's oath, which was attached to the second report when that report was presented to the council on the 12th September, was the oath taken by the engineer before commencing to perform the work which resulted in the former report, and that no other oath was subsequently taken by him, and that, except in so far as the resolution of the 22nd of August can be regarded as an appointment, the engineer was not appointed by the council to examine and report with respect to the work recommended by the second report.

I am of opinion that the report cannot be upheld either as an amended or as an original report.

Assuming the resolution of the council of Gosfield of the 22nd of August to be free from the objection that it might be regarded as an interference with the independent judgment of the engineer, it is quite clear that it did not and could not confer any authority to amend the report.

The evidence shews that when this resolution was adopted an appeal from the report to the Drainage Referee was pend-

ing, and therefore the Drainage Referee alone had jurisdiction, with the consent of the engineer and upon evidence given, to amend it: Townships of Adelaide and Warwick vs. Metcalfe(4). But even if the engineer had jurisdiction to amend it, I think that the resolution adopted by the council of Gosfield North on the 12th of September must be looked upon as not only an abandonment of the work recommended by the report, but an abandonment of the report itself. The second report, therefore, can in no sense be regarded as an amended report, but must be treated as an original report, and its validity as such must depend upon whether the essential antecedent conditions prescribed by the statute were complied with. What the respondents did in respect of the proposed drainage work was done under the authority of section 75 of the Drainage Act, R. S. O. ch. 226. That section empowers a municipal council to undertake and complete any of the works thereby authorized "on the report of an engineer or surveyor appointed by them," and section 5 of the same Act declares that "Any engineer or surveyor employed or appointed by any municipal council to perform any work under the provisions of this Act, including the assessment of real property for the purpose of drainage work, shall, before entering upon his duty, take and subscribe the following oath: 'In the matter of the proposed drainage work in the township of . . .: I . . . make oath and say, that I will, to the best of my skill, knowledge, judgment, and ability, honestly and faithfully and without fear of, or favour to, or prejudice against, any owner or owners, or other person or persons whomsoever, perform the duty assigned to me in connection with the above work and will make a true report thereon.'"

By the Drainage Act wide and extensive powers are conferred on the municipal council with respect to the construction and maintenance of drainage works and the imposition of taxes on lands to meet the cost thereof. It, however, declares that such powers shall be exercised by the council only upon the report of an engineer appointed by the council, and who, before entering upon his duty, has taken and subscribed

the oath prescribed by section 5. The statute for obvious reasons imperatively requires that an engineer who has been appointed by a municipal council to assess and charge the lands of individuals (perhaps against their wish) with the cost of a drainage work shall, before entering upon his duty, be sworn to discharge that duty faithfully and impartially, and it is the right of those whose lands are assessed for such a work to have them assessed by an engineer legally appointed and who is acting under the obligation of an oath. Courts sometimes construe the word "may" as imperative, and the word "shall" as directory. When, however, it is clear from the language of the Act that the Legislature intended to impose a duty, and not simply to confer discretionary power, the word "shall" must be construed as mandatory. "It is hard case law," said Mr. Justice Taschereau, in *Trenton vs. Dyer*(5), "that though the statute decrees that a certain thing 'shall' be done, it 'may' not be done, or need not be done, and I for one will always restrict the application of that law within the narrowest possible limits."

As being somewhat analogous in principle, reference may be made to the judgment of Meredith, C.J., in the recent case of *Re Burnett and Town of Durham*(6), where it was held that the failure of an arbitrator to take the oath required by sec. 458, R. S. O. ch. 223, rendered his award void. See in addition to the authorities there referred to *People vs. Connor*(7), *Crossett vs. Owens*(8), *Spring vs. Lowell*(9), *Cambria Street*(10), *Frith vs. Justices*(11).

It seems to me that the taking the oath in accordance with the terms of section 5 was essential in order to vest in the engineer jurisdiction to enter upon the performance of any of the work specified in section 75. It is jurisdictional and therefore failure to take it renders a report made under the Drainage Act a mere nullity. These objections to the report being, as I think, fatal to its validity, I do not think it necessary to discuss the other questions raised and argued. It follows that the appeal must be allowed with costs.

(5) (1895), 24 S. C. R. at p. 479.

(6) (1899), 31 O. R. 262.

(7) (1866), 26 Barb. 333.

(8) (1884), 110 Ill. 378.

(9) (1805), 1 Mass. 422.

(10) (1874), 75 Pa. St. 357.

(11) (1800), 30 Ga. 723.

COURT OF APPEAL, ONTARIO.

In the matter of the Report, Plans, Profiles, Specifications, Estimates and Assessments of W. G. McGeorge, Engineer for the Township of Chatham, in respect of the repair and improvement of the Chatham and Dover Townline Drain, dated the 18th October, 1898, and of the provisional by-law of the Township of Chatham, dated 22nd October, 1898.

TOWNSHIP OF DOVER VS. TOWNSHIP OF CHATHAM.

*Repair and Maintenance—Engineer—Independent Judgment.*

An engineer's report made upon instructions from a municipal council, and providing for the maintenance and improvement of a drain previously constructed, which it was the duty of the municipality to keep in repair, is not open to objection merely because, in the judgment of the engineer, the original plan on which the drain was constructed was a mistake, and one he would not have adopted.

Judgment of the Drainage Referee reversed.

The facts sufficiently appear in the judgments.

The appeal of the township of Dover came on for trial at Chatham on the 18th day of April, 1899, before Thomas Hodgins, Q.C., Referee, who found on the evidence of the engineer that the original drainage scheme was an engineering blunder, and that the money expended on its construction was to a great extent an improvident expenditure; and further, that the engineer had not in the proposed scheme of repair exercised an independent judgment. He held that the proposed work would practically be a perpetuation of the original blunder, and that it would be improper to give judicial sanction to the expenditure of more public money to perpetuate the original scheme of drainage, as it must be changed so as to be made effective for the benefit of the locality. He further held that whether the municipalities and the "co-adventurers" (as they had been aptly designated by Hagarty, C.J.O., in *Sombra vs. Chatham* (1)), were looked upon as

partners or co-owners or occupied the relation of trustees and *cestui que trusts*, it was not the course of the Court to sanction the expenditure or investment of their moneys in what were proved to be unwise or improvident undertakings; and that the same policy should control the investment of municipal moneys. He also held on the evidence of the engineer that he had not exercised an independent judgment in reporting in favor of the proposed scheme of drainage.

Upon the findings, and for the reasons given, a formal order was made allowing the appeal of the township of Dover.

The appeal of the township of Chatham to the Court of Appeal from this judgment or order was argued before MacLennan, Moss, and Lister, J.J.A., on the 16th day of March, 1900.

Aylesworth, Q.C., for the appellants.

Matthew Wilson, Q.C., for the respondents.

May 15th, 1900. MacLennan, J.A.:—

The question in this appeal concerns a drain constructed under a by-law of the township of Chatham passed on the 4th January, 1872, along the townline between Chatham and Dover, on a report of engineer McDonell, dated the 25th September, 1871. By that report and by-law lands in both townships were assessed, and the townships were also both assessed for an equal sum in respect of benefit to the townline road. The engineer also by his report directed on the authority of sec. 172 of the Act 32 Vict. ch. 43, that when the drain should be constructed the expense of maintaining it and keeping it in repair should be equally borne by the township of Chatham, township of Dover, and county road or townline between Chatham and Dover.

The drain was constructed wholly upon the road allowance and on the Chatham side thereof, encroaching, as I understand, at one place slightly upon land in the township of Chatham.

On the 6th October, 1898, the council of Chatham passed a resolution instructing the clerk to notify Engineer McGee "to make an examination and report on the Chatham

and Dover Townline Drain." On the 18th October following McGeorge made his report, wherein he found that the drain was badly filled up with earth and silt, overgrown with grass, reeds, weeds and willows, and the capacity thereof greatly diminished and impaired during the 25 years since its construction; and he recommended that, besides being cleaned out, it should be made deeper towards its outfall than it was originally, and that its original dimensions at other points should be altered, in some places increased and in other places diminished. He estimated the cost of the work and he assessed the same upon the lands and roads in both townships.

The township of Dover has appealed against that report, and one ground of objection is that the report is not the result of the independent judgment of the engineer, and upon that objection the learned Referee allowed the appeal. The only evidence used before the Referee was that of the clerk of the township of Chatham and of the engineer, and the various reports, by-laws and documents therein referred to; and it was understood that upon the present appeal the township of Dover should be entitled to urge any other objections to the report of the engineer which might be open to it upon the proceedings.

On the 30th September, 1897, the council of Chatham had requested McGeorge to take levels upon the townline drain and to report upon a new outlet to the Chenal Ecarte along the 16th and 17th concession line. On the 15th July he reported against the proposed new outlet, but recommended the repair of the townline drain, which he found very much filled up. Thereupon he was instructed "to prepare plans and estimates for the improvement of said drain." He then prepared a report of the 16th March. In this report he says that the original plan on which the drain was constructed was a mistake in cutting off and closing up certain streams which it crossed in its course. While, however, such was his opinion, he says he would not like to propose such a radical change as to reopen those streams, and he prepared estimates of cost and assessment of lands and roads in both townships. This report was appealed against by Dover, it does not appear

upon what ground, and the report was abandoned on the 13th of September after a provisional by-law had been passed. The council of Chatham then began *de novo*, and gave the engineer the instructions of the 6th of October already referred to, and it is the opinion of the engineer expressed in his report of the 16th March, upon which the learned Referee acted in holding that the report in question was ~~not~~ the result of his independent judgment. I understand his judgment was also influenced by the fact that on the 23rd December afterwards a petition was presented to the council by Mr. McGeorge and other landowners in Chatham, asking that the townline drain should be improved by making a new outlet by opening Maxwell Creek, one of those which had been cut off and closed by the original construction of the townline drain, and carrying it to the Chenal Ecarte or Little Bear Creek. I am constrained to differ from the learned Referee on this ground: What the engineer was required to do was to report upon the repair and improvement of the old drain, and not upon a totally new drainage scheme, which the opening of one or more of the streams which had been closed by the original construction would be. He could change the dimensions under sec. 75, in order to make the original scheme more efficient, but he was not bound to report a new scheme, nor if he had done so was the council obliged to adopt it. There had been complaints of the want of repair of the drain, and the appellants were under obligation to repair, and I think the engineer's report a very proper report notwithstanding his opinion of the original plan of the drain.

Some other grounds of invalidity were urged by Mr. Wilson, but so far as they were open upon the evidence before me I do not think any of them were entitled to prevail. The appeal must be allowed with costs.

Moss, J.A.:—

This is an appeal by the township of Chatham from the order or decision of the Drainage Referee allowing an appeal by the township of Dover from the report, plans, profiles, specifications, estimates, and assessments of W. G. McGeorge,

the engineer of the township of Chatham, dated 18th October, 1898.

The notice of appeal to the Referee sets forth twenty-three objections; but at the trial the only evidence put in, and the whole argument addressed to the Referee, was directed to a ground not specified in the notice, viz.: that the engineer in making his report had not exercised an independent judgment, and that the drainage work purported to be recommended by his report was not the work which, in his said independent judgment, he considered the proper one under the circumstances. This preliminary question as it was called at the trial, was raised upon the depositions of the clerk of the township of Chatham taken before trial, his depositions taken for the purposes of an appeal previously taken to another report on the same drainage works, and the depositions of the engineer taken before trial, together with the exhibits therein referred to.

Upon the conclusion of the argument judgment was reserved and was subsequently delivered giving effect to the objection and allowing the appeal on that ground. Unfortunately owing to the absence of the official stenographer when judgment was delivered, we are without the advantage of seeing the reasons which led the learned Referee to his conclusion.

On the argument before us, it was urged that the engineer did not exercise an independent judgment as to the nature of the work to be done, because he misconceived the scope of his instructions and his authority to deal with the drainage works in question under sec. 75 of the Act. It was said that he did not make the recommendation respecting it which he would have made if he had not supposed that it was not open to him to do so, having regard to the instructions given him.

I have not been able to come to the conclusion that this is correct.

The subject to be dealt with was the Chatham and Dover Townline Drain, which the council of the township of Chatham had been notified to repair and improve for its better maintenance and to prevent damage to adjacent lands.



The council had directed proceedings to that end and there had been a report, and a provisional by-law which had proved abortive, and had led to a successful appeal by the township of Dover. Finally on the 6th of October, 1898, a resolution was passed rescinding a resolution of the 13th of September, ultimo, and instructing the clerk to notify W. G. McGeorge to make an examination and report on the Chatham townline drain.

This resolution was communicated to Mr. McGeorge, and in response he made the report, plan, profiles, specifications, estimates and assessments now complained of. I think, having regard to the previous proceedings and former resolutions which had been furnished to him, he rightly interpreted this resolution as instructing him to examine and report on the Chatham and Dover townline drain with a view to its repair and improvement and better maintenance. The townline drain was treated as a fixed factor, the necessity for its repair and improvement was apparent, and the council placed in the hands of the engineer authority to report a scheme for the repair, improvement and better maintenance of that existing drain. This he proceeded to do and his report shows what, in his judgment, should be done. There is nothing in the report to indicate that the conclusions therein stated are not the result of his own deliberate and unconstrained judgment. No doubt his opinion was and is that the original scheme of draining by the construction of the townline drain in the way in which it was designed and carried out was a mistake, and that if he had to deal now with an original scheme of drainage he would not adopt the townline drain scheme. But accepting it as an existing drain and considering what was best to be done with it in order to get the greatest utility out of it, he reports in favor of the work specified. There is nothing to shew that these conclusions were forced upon him by the council or otherwise against his will by outside influences.

In this respect the case differs entirely from *Re Clark vs. Howard* (2), and *Re Jenkins vs. Enniskillen* (3), in which

(2) (1887) 14 O. R. 598.

(3) (1894), 25 O. R. 399.

the evidence clearly established that the engineer was prevented from exercising or giving effect to his own unfettered judgment by the active interference of the municipal councils concerned.

It was further urged by the respondents on the argument before us that the township of Chatham had not accepted the burden of the work to be done under the engineer's report, and that until the council had passed a by-law for that purpose it was improper to serve the township of Dover with a copy of the report, plans, etc.

This question was not argued before, or passed upon by the Referee, and it is clear that all the evidence bearing upon it has not been produced.

In the depositions of the township clerk it is stated that Mr. McGeorge's report of the 18th October, 1898, was read at a meeting of the council held on the 22nd October, and a resolution was immediately afterwards carried adopting the report and instructing the reeve to serve the reeve of Dover with a copy. It is further stated that the minutes also shew that a by-law was provisionally adopted at the same meeting, that is the by-law of the 22nd October, 1898, and the reeve was instructed to serve a certified copy of that. The resolution and by-law were not put in, but the notice of appeal to the Referee is styled "In the matter of the report, etc., and of the provisional by-law of the township of Chatham, dated 22nd October, 1898," and states that Dover appeals to the Referee against the report, etc., and by-law above mentioned.

It will probably be found when all the evidence is in that all that was necessary to be done before serving the township of Dover with the copies of the report, etc., was done. At all events, the case is not now ripe for decision on the point.

The Referee's order or decision should be set aside and the case should be remitted to him for trial upon the objections open to the township of Dover upon the notice of appeal.

The latter township should pay the costs of this appeal.

Costs of former trial to be costs to the township of Chatham in any event.

Lister, J.A. :—

This is an appeal by the corporation of the township of Chatham from the judgment or decision of the Drainage Referee allowing an appeal to him from the report, etc., of W. G. McGeorge, the appellants' engineer, concerning the repair and improvement of the "Dover and Chatham Townline Drain," which was constructed by the appellants between the years 1872-1875, under the authority of a by-law passed pursuant to the provisions of the Municipal Institutions Act then in force.

Its effect was to cut off and divert the waters of several creeks that theretofore flowed from the appellant township into the respondent township, and were discharged into the Chenal Ecarte. Complaints having been made to the appellants that the drain was out of repair, they appointed Mr. McGeorge, C.E., to examine and report on its condition. He did so, and from his report the respondents appealed to the Drainage Referee, who gave judgment allowing the appeal upon the single ground that the engineer in making the report did not exercise an independent judgment.

No witnesses were called or examined at the trial or hearing. The judgment of the learned Referee was founded upon statements contained in a former report made by the same engineer in respect of this drain, and upon his depositions and the depositions of the respondents' clerk taken before the trial, and the exhibits filed on the taking of such depositions. After a very careful examination of all the papers upon which the learned Referee proceeded, I am, with much respect, unable to agree with the conclusion at which he arrived. I think the facts therein disclosed fail to support the learned Referee's finding. What they do establish is that in the opinion of Mr. McGeorge, the plan or scheme of the drain as originally constructed (which involved the cutting off and diverting the waters of the creeks before alluded to) was, in so far as the appellant township is concerned, a mistake, and that these creeks might be made to resume their natural directions by improving their beds, but he did not, either by his former report or in the report which forms the

subject of this enquiry, recommend the execution of such a scheme. In the report appealed from he recommends only the repair and improvement of the drain in conformity with plans, etc., and that the roadbed be raised with the earth taken out of the drainage work.

That this report is in accordance with the scheme of repair that the appellants contemplated undertaking is, I think, apparent from the fact that the by-law provisionally passed for the authorization of the work, recommended by the report, accepted and adopted it.

But it is said that because the engineer entertained an opinion that the original scheme of construction of the drain was a mistake, and that by the new scheme which he suggested—but did not recommend—and which, in his opinion, would beneficially affect lands in the appellant township as affording them additional outlets, he did not, in not recommending such new scheme in connection with the proposed repair and improvement of the drain in question, exercise his independent judgment, and therefore the report is invalid.

In my opinion this contention is not maintainable. The statute confers on municipal corporations a discretionary power in relation to the construction of drainage works, but when such power has been exercised by the construction of such a work, it in absolute terms requires that the municipality whose duty it is under the statute to maintain and keep the work in repair, shall discharge this duty. It does not require that the corporation shall, for the purpose of increasing the efficiency of the drain, or for any other purpose, change its course, make a new outlet or in any respect alter it. If the work is kept in repair the requirements of the statute are satisfied.

But even if Mr. McGeorge had given effect to his opinion with regard to the opening up of the creeks by embodying that opinion in and making it a part of the work recommended by his report, the appellants clearly would not be obliged to accept and execute the work thereby recommended. On the contrary, it would have been their right to refer it back to him for amendment or modification, and if that had

occurred, could it be argued that the amended or modified report would, as not being in accordance with the independent judgment of the engineer, be invalid? I do not think so. It is, as it appears to me, quite within the powers of a municipal council to accept or reject the report of an engineer which involves more than the repair or other improvement contemplated by the council, and it cannot be said that the report of an engineer in respect of the repair or improvement of a drainage work is invalid by reason of the non-exercise of his independent judgment, because it does not recommend an additional scheme which, in his opinion, would render the original drainage work more effective than a work of mere reparation, but which the council do not wish to undertake.

What the appellants required and what the engineer did was to report upon the work necessary to be done in order to repair and improve an existing drain, which they were under a statutory obligation simply to maintain and keep in repair, and in so far as his report on this work is concerned the evidence upon which the judgment of the Referee proceeded fails to show that it is not the result of the engineer's independent judgment.

The appeal must be allowed with costs, and the case remanded to the Referee for trial. Costs of the former trial to be costs to the township of Chatham in any event.

BEFORE THE DRAINAGE REFEREE.

In the matter of an Appeal by the Township of Plympton from a report of an engineer appointed by the Council of the Township of Sarnia upon the construction of the "Cow Creek Drain."

TOWNSHIP OF PLYMPTON VS. TOWNSHIP OF SARNIA.

*Petition—Sections 59 and 75 of "The Municipal Drainage Act"—  
Neighboring Municipalities—Assessment.*

The persons to be counted in computing the majority required in a petition for a drainage work are the assessed persons within the described drainage area, who are (1) owners whose lands are to be "benefited"; (2) owners whose lands are to be assessed for "injuring liability," and (3) owners whose lands are to be assessed for "outlet liability."

Section 59 of the Municipal Drainage Act does not dispense with the necessity for a petition.

Section 75 of the Municipal Drainage Act does not authorize a neighboring municipality without a petition to initiate a drainage scheme within its own territory, and connect it with the drainage system of another municipality in which the area of such drainage system wholly lies.

The liability for assessment of the lands of a higher township should be measured by the cost of the enlargement of the proposed drainage work in the lower township, so as to give it sufficient capacity to carry down the waters from the higher township to a proper outlet.

This appeal came on for trial at the court house in the town of Sarnia on the 7th, 8th and 17th days of March, 1897.

Mr. W. J. Hanna appeared for the township of Plympton, and

Mr. John Cowan for the township of Sarnia.

The following judgment was given on the 5th day of May, 1899, by

Thomas Hodgins, Q.C., Drainage Referee:—

The engineer's report in this case states that under the instructions of the respondents' council, and pursuant to a petition of Robert Bright and others, asking for the drainage of a certain described area in the neighborhood of Cow Creek,

he had made an examination of the locality, and found that the drainage asked for was necessary, and recommended that the prayer of the petition should be granted, and that a proper and sufficient drain should be constructed to be known as the "Cow Creek drain," within the locality described in his report.

The appellants contend that the petition referred to was invalid in that it had not been signed by the requisite majority of the resident and non-resident owners of the lands to be benefited in the described area; and after hearing the evidence respecting the title of several of the petitioners, I held that in ascertaining such "majority of resident and non-resident owners" the several sub-sections of section 3 should be considered; and that from such sub-sections it would appear that the assessed persons within the described drainage area who are (1) owners whose lands are to be "benefited" (sub-sec. 1); (2) owners whose lands are to be assessed for "injuring liability" (sub-sec. 3); and (3) owners whose lands are to be assessed for "outlet liability" (sub-sec. 4), should be counted in computing such majority.

That such is the proper mode of computing the statutory majority of owners is, I think, clear from the words at the end of each of the sub-sections 3 and 4: "the owners of lands or roads thus made liable for assessment shall neither count for nor against the petition required by sub-section 1 of this section, unless within the area therein described."

These sub-sections must also be read as authorizing the engineer of the initiating municipality to assess those lands and roads outside the limits of the drainage area from which waters are artificially "caused to flow upon and injure" the lands within such drainage area (sub-sec. 3), and also such outside lands and roads as "use the drainage work as the outlet" for their drainage waters (sub-sec. 4). They confer, I think, supplementary powers upon the municipality and its engineer to carry out a complete and efficient scheme of drainage which the necessities of the locality may require; and in assessing such injuring or outlet-using lands and roads outside the petition-described area, all the statutory formalities

"except the petition" are to be observed. But the words quoted from the latter part of the sub-sections must be held to indicate that the right to initiate a drainage scheme, such as the one in question, under which jurisdiction to impose an assessment upon the lands and roads of another municipality, which come within the provisions of these sub-sections, is sought to be enforced, can only be conferred upon and exercised by such initiating municipality when a petition duly signed by the statutory number of owners is presented to the initiating council as prescribed by sub-section 1.

Sub-sections 3 and 4 may be said to be the statutory descendants of sections 22 of 44 Vic. c. 24 and 590 of 46 Vic. c. 18, amended by 49 Vic. c. 37; s. 30, by inserting after the word "formalities" the words "except the petition" (see R. S. O. 1887, c. 184, s. 590), and further amended by the Consolidated Municipal Act of 1892, 55 Vic. c. 42, s. 590, by the addition of the words at the end of each sub-section as quoted above. But sub-section 4 appears in municipal Acts since 1869.

Guided by these considerations, and the evidence respecting the title of several of the petitioners,—some of whom had not the statutory qualification of petitioners,—I found that the petition had not been signed by the required majority of owners within the described drainage area; and that the assessment of the appellants for this Cow Creek drain could not be sustained under section 3 of the Act. But I reserved the right to the respondents to show that it might be sustained under the other clauses of the Act, which authorize the initiation of drainage works without a petition.

The sections under which the lands and roads of other municipalities may be assessed for drainage works are sections 59 and 75. Section 59 cannot be held to warrant these proceedings, for it does not indicate that the petition required by section 3 may be dispensed with. And section 75, by limiting the authority to make certain improvements in a drainage work to the municipality or any of the municipalities "whose duty it is to maintain the said drainage work"



—which duty in the case of a drain extending or continued into more than one municipality is, by section 69, cast upon each of the municipalities as to the portion of such drain within their respective boundaries—shows that when the drainage area sought to be affected lies wholly within one municipality, the neighbouring municipality cannot as of right, and on its own motion, initiate a drainage scheme within its own territory and connect it with the drainage system of such neighbouring municipality so as to exercise the powers of taxation over such neighbouring municipality conferred upon municipalities by that section. Any such drainage scheme must, I think, be initiated by a petition under sub-section 1 of section 3.

What is proposed by this report and by-law is practically a new scheme of drainage within the boundaries of the township of Sarnia, which is to be connected with the present drainage system of Plympton, and to provide an outlet for both, and thereby relieve the Sarnia lands from the waters poured down upon them from the upper lands. Neither Plympton nor Sarnia have constructed a continuous or combined drainage system, which connects the Plympton drains with any Sarnia drains. The Plympton waters are carried no farther than Cow Creek at the town line. There appears, however, a short extension of the Montgomery branch of the Plympton drains through William Warren's lot in Sarnia at the town line. But both parties have admitted before me that such extension had never been constructed by either municipality under the Drainage Acts or paid for by local assessment under such Acts, nor paid for by Sarnia out of its general funds (see R. S. O. 1877, c. 174, s. 535).

On the plans produced there appears another drain further south, spoken of in the evidence as a "local drain" along a side road in Sarnia, none of the waters of which, according to the engineer's evidence, would have flowed into Cow Creek, but would into Perch Creek, with which Cow Creek unites. His evidence also shows that 1,060 acres of land in Sarnia outside the Cow Creek watershed drainage system, drain into this "local drain," but that it requires no enlargement, either for the drainage of the 1,060 acres, or for the Plympton

waters flowing down Cow Creek. And it was not argued before me by either party that this "local drain" on the side road was or could be claimed to be a drainage work in Sarnia to be improved under section 75 (which comes from 45 Vic. c. 26, s. 17), so as to enable Sarnia to claim jurisdiction to initiate the proposed Cow Creek drainage scheme, and tax the lands and roads in Plympton for a proportion of the cost of its construction. These 1,060 acres are not assessed for any part of the proposed improvement of the upper portion of Cow Creek.

Under these states of facts it would appear that the rule affirmed in *Chatham v. Dover*, (1) where many of these sections of the Municipal Act respecting drainage were reviewed, must be held to apply to this case. And that by analogy the observations of Mr. Justice Gwynne in that case may be quoted as applicable here: "The presentation of a petition signed by a majority of the owners of property in the township of Chatham to be benefited by the proposed work is a condition precedent to the acquisition by Chatham of any jurisdiction whatever over the township of Dover, or over any lands situate therein."

But apart from these statutory provisions there are other grounds against the report being sustained. The engineer states that the cost of enlarging Cow Creek so as to give it the necessary capacity to carry the extra waters which flow into it from the Plympton drainage system would amount to \$3,847, but he has charged Plympton with \$4,425, or \$578 more than the cost of what is necessary to enlarge the creek and provide a sufficient outlet for the carriage and discharge of the waters flowing from the Plympton drains. He also stated that the proposed work would cost \$6,950; and that the enhanced value which the proposed drainage work would give to the Sarnia lands benefited thereby would amount to \$4,242; but that he had assessed the benefited lands in Sarnia only \$2,525. Calling his attention to the difference, he answered that he thought the persons (in Plympton) who had caused the depreciation in value of the Sarnia lands should pay the extra sum beyond the enhanced value of the lands.

It is stated in the U. S. cases that the assessment should be made on all the "property specially benefited according to the exceptional benefit each lot actually and separately receives, and the excess beyond that should be borne by the municipality at large" (2).

I do not think the law will be found to apply such a principle of assessment to cases like the present. Without expressing a definite opinion on a point not argued, it would appear, as a matter of first impression, that the liability of Plympton to Sarnia should be measured by the cost of the enlargement of the proposed drainage work, so as to give it sufficient capacity to carry down the Plympton waters to a proper outlet, and thereby relieve the Sarnia lands of the injury complained of. In actions for damages which might be brought by the owners of lands in Sarnia, perhaps the proper measure of damages would be the depreciation in value of their lands caused by the action of the water from the Plympton drains.

It is a well settled rule of law that every charge in the nature of duties or taxes must be authorized and imposed by clear and unambiguous language in the Act enforcing such charge, and that all such Acts must receive a strict construction. Therefore, these Drainage Acts which impose burdens on the public are to be so construed: Per Burton, J.A., in *Stephen v. McGillivray* (3). And also that assessments under these Acts which are imposed by an officer of an upper (or initiating) municipality should be scrutinized with the utmost care and jealousy: Per. Gwynne, J., in *Dover v. Chatham* (4). These observations are peculiarly applicable to the present case.

There were other objections urged against the proposed drainage work, some of which are set out in the grounds of appeal, and some of which were brought out in evidence; but I think it will not be necessary for me to consider them unless the parties so desire.

The appeal of the township of Plympton must, therefore, be allowed with costs.

(2) Dillon's Municipal Corporations, vol. 2, sec. 761.

(3) 18 A. R. 522.

(4) 12 S. C. R. 342.

## COURT OF APPEAL, ONTARIO.

## McKIM vs. TOWNSHIP OF EAST LUTHER.

*Local Master—Jurisdiction—Referring Actions to Drainage Referee—  
Mandamus—Notice—View—Damages.*

A local Master of the High Court has jurisdiction by virtue of Rules 42 and 49—see also Rule 6 (a)—to make an order, under section 94 of the Municipal Drainage Act, R. S. O. 1897, ch. 226, referring an action brought in his county to the Referee under the drainage laws.

A letter written by the complainant's solicitor to the council of the municipality, stating that the land in question has been flooded by water from a drain constructed by the municipality, but not saying anything as to the drain's condition, and asking them to construct and maintain such drainage work as is required to relieve the land, is not a sufficient notice under section 73 of the Drainage Act to justify the issue of a mandamus. It is the claimant's duty to show that proper notice has been given if a mandamus is asked for, and objection to the sufficiency of the notice may be taken by the defendants at any stage of the action without pleading want of notice.

The Drainage Referee in trying an action may proceed partly on view, but in so doing must follow strictly the directions of the Act, and not make the view without appointment or notice to the parties. If he do so proceed, however, his finding, though partly on the view, may be upheld if the evidence supports it.

A complainant is entitled to recover for any injury to the use and enjoyment of his land or for its depreciation in value, if caused by failure to keep a drain in repair, but not for depreciation in value based upon the alleged insufficiency in size of the drain as originally made, and the Court holding, on the construction of the Referee's judgment, that this element had been allowed to enter into the computation of the damages, reduced them from \$250 to \$50.

This action having been referred to the Drainage Referee by an order of the local Master at Guelph, it came on for trial at the court house at Orangeville on the 6th, 7th, and 8th days of June, 1899. The facts sufficiently appear in the judgments delivered.

The following judgment was delivered on the 25th of October, 1899, by

Thomas Hodgins, Q.C., Drainage Referee:—

Subsequent to the trial of this action and on the 13th July last, I made a personal inspection of the locality of the

drain No. 10 in question from a little way south of the seventh concession road to the McKim bridge, and from thence north along the drain for over 1,000 feet from McKim's bridge. As the result of such inspection I found that the channel of the drain from south of the seventh concession road to McKim's bridge was narrow and had rubbish in it, and, in some places, a floating but stationary sediment. The other rubbish consisted of wood chips and portions of branches of trees lying at the bottom of the drain. The flow of water at the time was in some places normal, and in other places a little swifter than normal. The channel of this part of the drain had flowing water from about eight inches to a foot in depth, and in the narrowest part was about three feet six inches wide. On the north side of the McKim bridge where it crossed the creek and drain, the water in the drain had a depth of about two feet two inches. Further on to where a log crossed the drain, about 250 or 300 feet north of the bridge, the water was about one foot eight inches deep. North of this log and for a long distance the channel of the drain had a thick growth of weeds which impeded the easy and swift flow of the water; and at different places among the weeds, the depth of the water varied from about a foot to one foot six inches.

From this inspection of the locality of the drain and the evidence of the plaintiff's witnesses, and of some of the defendants' witnesses, I must find that drain No. 10 is not in a proper or sufficient state of repair; and that the said defendants have neglected to maintain the drain as required by law.

And on the evidence I also find that this drain has brought down to the plaintiff's land by artificial means large quantities of water which have been poured into the creek, and which the drain and creek are not in such a proper state of repair as to carry off as rapidly as they are brought down to the plaintiff's land, whereby the plaintiff's land has been flooded and her crops thereby damaged. And I assess the plaintiff's damages from such flooding at \$250, and award the plaintiff her costs of this action against the defendants.

I also find that the plaintiff is a person interested in the said drain, and that her property has been injuriously affected by the condition of the said drain, and I direct that a mandamus do issue requiring the defendants to maintain the said drain as required by law.

From this judgment the defendants appealed to the Court of Appeal.

Upon the appeal coming on for argument on the 4th June, 1900, before Osler, MacLennan, Moss and Lister, JJ.A., the first ground taken by the appellants was that the order of reference was invalid. Judgment was reserved as to this point after argument.

Mabee, Q.C., for the appellants.

Matthew Wilson, Q.C., for the respondent.

On the 19th September, 1900, the judgment of the Court, reported in 19 Practice Reports, p. 248, was delivered by

Osler, J.A.—The proceedings before the Referee were taken under an order dated the 9th January, 1899, made on the application of the plaintiff, whereby, upon hearing read the affidavits filed and the exhibits therein referred to, and upon hearing counsel for the parties, and it appearing that the action might be more conveniently tried and disposed of by the Referee, it was ordered that the action should be and the same was thereby referred to Thomas Hodgins, Esquire, Referee under the Drainage Laws.

It was further ordered that the costs of the action and of the motion and of the reference should be in the discretion of the Referee.

The order was made by the local Master of the High Court at Guelph, the county town of the county in which the action was brought.

On the opening of the appeal the objection was urged that the Referee had no jurisdiction or authority over the subject-matter of the action, because the local Master at Guelph had no authority or jurisdiction to make the order of the 9th of January, 1899, and, therefore, that all the proceedings before the Referee were *coram non judice* and void.

We directed that the hearing of the appeal should stand over until we had considered this objection, because, however unreasonable may be the conduct of the appellants in taking it for the first time at this stage of the proceedings, it strikes, if well founded, at the root of our jurisdiction to entertain the appeal. The consequence of that would be, however little as it may have been anticipated by the appellants, that it would be left to them to take such other proceedings elsewhere as they might be advised in order to get rid of the report.

From the terms in which the order is framed it is evident that it was intended to be made under the 94th section of the Drainage Act, R. S. O. 1897 ch. 226, and the local Master's authority to make it, if any he had, was derived under that section and the rules made under the Judicature Act prescribing his jurisdiction to deal with actions pending in the High Court.

The 94th section, which is a consolidation of the corresponding section of the Drainage Act of 1894, 57 Vict. ch. 56, enacts that where an action for damages is brought and in the opinion of the Court in which it is brought or of a Judge thereof, the proper proceedings is under the Act—That is to say, that it should have been taken by way of appeal under section 93, without action, directly to the Referee—or that the action may be more conveniently tried before and disposed of by the Referee—that is to say, where the matters in question are legitimately the subject of an action—the Court or Judge may, on the application of either party or otherwise, and at any stage of the action, make an order transferring or referring it to the Referee, and should no application or order be made as aforesaid, the Court or Judge shall have jurisdiction to try the action subject to appeal, and such jurisdiction shall include all the relief within the powers granted by the Act to the Referee as well as those of the High Court.

The intention of the Legislature in passing this section, as has frequently been pointed out, was, that in prosecuting a demand for compensation or damages a claimant should no

longer be liable to be defeated merely because he had commenced his proceedings by action instead as formerly by arbitration, or by a direct appeal to the Referee: *Township of Ellice v. Hiles*(1), *Thackery v. Township of Raleigh*(2).

Whatever may be the subject of the demand, if it has been sought by way of action, it may now be sent to the Referee or may be disposed of by trial in the ordinary way.

In the present case the plaintiff's demand seems to be an actionable one.

By Rule 42 it is provided, that the Master in Chambers in regard to all actions brought in the High Court, shall be and he is thereby empowered and required to do all such things, transact all such business, and exercise all such authority and jurisdiction in respect to the same as are now done, transacted, or exercised by any Judge of the said Court sitting at Chambers, save and except in respect to certain excepted matters, one of which is the making of orders for reference (except by consent) under the Arbitration Act.

And by Rule 49 it is provided that the local Master shall, in all actions brought in his county, have concurrent jurisdiction with and the same power and authority as the Master in Chambers has in all proceedings now taken in Chambers at Toronto, with certain further exceptions.

And see also Rule 6(a).

These Rules have the force and authority of a statute: 59 Vict. ch. 18, secs. 13, 14, 15; O. J. Act, R. S. O. 1897 ch. 51, sec. 129.

It does not admit of doubt that such an order as the one in question might have been made by a Judge in Chambers under the first branch of sec. 94: "Where . . . in the opinion of the Court or of a Judge thereof, etc. . . the Court or Judge may . . . at any stage of the action" (and therefore not at the trial stage only) "make an order," etc.

In *Dallow v. Garrold*(3), Brett, M.R., says at p. 78: "It is well recognized that that phrase always includes a Judge

(1) (1894), 23 S. C. R. 429. (2) (1898), 25 A. R. 226, 231.

(3) (1884), as reported in 54 L. J. Q. B. 76.



at Chambers, unless there is some express enactment limiting the meaning of the phrase:" and I would add unless it is used in reference to some function which a Judge sitting at chambers does not exercise. See also *Baker vs. Oakes*(4), and *In re B*——(5), which shew that it has the same meaning when used in the Rules. Then, as the order is one which at the time the Rules came into force a Judge sitting in Chambers might have made, and is not an order for reference under the Arbitration Act, having been made under the authority of sec. 94, and is not otherwise excepted from the jurisdiction of the Master in Chambers or local Master, and was made in an action brought in the county for which the local Master was appointed, the jurisdiction of the latter to make it under the authority of the Rules above cited was, I think, complete.

It has been said, however, that the jurisdiction conferred by these Rules upon the local Master can not extend to authorize him to act under the first branch of section 94, because in the latter part of the section the same phrase "Court or Judge" is used in reference to the trial of the action, a jurisdiction which the officer can not exercise, which shows that the intention of the Legislature was, that the order when made by a Judge should be made only by a Judge who could try the action.

I think there is nothing in this point. The words in the latter part of the section are not "such Court or Judge," as if referring to the same words in the earlier part, but simply, "should no application or order be made, the Court or Judge shall have jurisdiction to try the action," etc. But it is not necessary to lay much stress upon this. The two branches of the section deal with different powers of the Court or Judge: one, the making of orders "at any stage" of the action, and the other, the trial of the action. And when in the latter branch it is said that the Court or Judge shall have jurisdiction to try the action it is evident that the functions of a trial Judge or Court under sections 46 and 65 of the Judicature

(4) (1877), 2 Q. B. D. 171, 175.

(5) (1892), 1 Ch. 463.

Act are meant, as distinguished from those of a Judge in Chambers.

While the latter may be exercised by the Judge, there is no reason why they may not also be exercised by the judicial officer, or for holding that his power to act under the first branch of the section is circumscribed by the fact that he has none under the second.

I am of opinion, therefore, that the Drainage Referee was lawfully seised of the case, and that the appeal from his report is competent and must be heard upon the merits.

See *Coyne v. Lee*(6), *Clancey v. Young*(7), *Teskey v. Neil*(8), *Burgess v. Morton*(9), *Moore v. Gamgee*(10), *In re Burrowes*(11), *Crawford v. Township of Ellice*(12).

Objection overruled.

The appeal on the merits was argued before Armour, C.J.O., Osler, Maclellan, Moss, and Lister, J.J.A., on the 24th and 25th of September, 1900, by the same counsel.

January 17th, 1901. The judgment of the Court, reported in 1 O. L. R. p. 89, was delivered by

Lister, J.A. :—

The plaintiff sues to recover damages caused, as she alleges, by the waters of a drain, constructed by the defendants and known as No. 10, flooding and overflowing her lands, being lot 18 in the 7th concession, and lot 19 in the 6th concession, of the defendant township.

This drain commenced at the south-east angle of lot 19 in the 5th concession of the township of East Luther, and thence ran in a northerly direction to near the north limit of said lot 19 in the 5th concession, and thence in a north-westerly direction to the township line between the township of East Luther and the township of West Luther, and continuing along the West Luther side of the town line from a point about the middle of lot No. 18 in the 6th concession of the

(6) (1887), 14 A. R. 503.

(9) (1896), A. C. 136.

(7) (1893), 15 P. R. 248.

(10) (1890), 25 Q. B. D. 244.

(8) (1893), *Ib.* 244.

(11) (1868), 18 C. P. 493.

(12) (1898), 35 C. L. J. 391, 19 C. L. T. Occ. N. 196.

township of West Luther to a point upon or adjacent to the plaintiff's land, where a certain creek crossed the township line, and from thence ran in a north-easterly direction across the township line back into the township of East Luther, where it was intended it should discharge into the creek, which creek was intended to form the outlet for the drain.

It was constructed by the defendants between the years 1892 and 1895 under the authority of a by-law provisionally adopted on the 26th of March, 1892, and finally passed on the 30th of May following, pursuant, as it is therein recited, to the drainage provisions of R. S. O. 1887 ch. 184.

The by-law recites that a majority in number of the owners to be benefited by the proposed work had petitioned the council of the defendant township to construct a drain for the purpose of draining certain parts of the 4th, 5th, 6th, 7th, 8th, 9th, 12th, 13th and 14th concessions of the defendant township, and it further recites that the council thereupon procured an examination to be made by a competent engineer of the localities to be drained and had procured plans and estimates to be made by such engineer, and also caused an assessment to be made by him of the real property to be benefited by such drainage, etc., etc. And it enacts that such reports, plans and estimates should be adopted and that the drains and works should be constructed in accordance therewith. Lands and roads in both East and West Luther, including the plaintiff's lands, were assessed by the engineer for the cost of constructing the drain.

The corporation of West Luther appealed against the engineer's assessment of lands and roads in that municipality. An arbitration was had, which resulted in an award being made by which the assessment upon lands and roads in that municipality was reduced.

The by-law appears, by the certificate of the registrar filed on the argument before us, to have been duly registered on the 13th June, 1892, and it is admitted that no application or action to quash or set it aside has ever been made.

The plaintiff, by her statement of claim, alleges, *inter alia*, that the drain was negligently and improperly laid out;

that no proper or sufficient outlet was provided or now exists therefor; that it was not constructed according to the alleged by-law and plans and specifications therefor; that it was not constructed of a width, depth, and size, sufficient to carry off the water which flowed and accumulated therein, and that the same overflowed into the plaintiff's lands, which, in consequence thereof, have been injuriously affected; and she further alleges that the defendants allowed the drain to become out of repair and to remain so for a long period of time, and have taken no proper steps to put the same into repair or to enlarge the said drain or make it the proper width and depth or provide a proper or sufficient outlet therefor; and she claimed (1) damages; (2) a mandamus to compel the defendants to enlarge, deepen, and repair, the said drain and to provide a proper and sufficient outlet therefor; (3) an injunction to restrain the defendants from continuing to flood the plaintiff's lands as aforesaid; and also (4) such further and other relief as the nature of the case might require.

The defendants, besides denying the allegations contained in the statement of claim, say (1) that no waters were brought down out of their natural flow or wrongfully or improperly lodged upon the plaintiff's lands, and they deny that the plaintiff's lands became unfit for use or injured as the result of the construction of the drain. They also say that the drain was properly laid out; that a proper and sufficient outlet was provided therefor; that it was constructed according to law, and the by-law and plans and specifications therefor and under the supervision of a regularly qualified engineer with whom these defendants did not in any way interfere in such work of construction or supervision, and that it was so constructed, and still is, of a width, depth, and size, sufficient to carry off the water which flowed and accumulated therein and to answer all purposes for which it was constructed; that they properly maintained the said drain, and that it has greatly benefited the plaintiff's lands and other lands assessed therefor, and has answered all purposes for which it was constructed or intended.

The action was duly referred to the Drainage Referee for trial, and was tried before him on the 6th, 7th, and 8th of June, 1899. He reserved his decision until the 25th October of the same year, when he gave judgment for the plaintiff and assessed the damages at \$250, and ordered a mandamus to issue commanding the defendants to maintain the drain as required by law. The first paragraph of the formal judgment, which was entered by and for the plaintiff on these findings, on the 21st of November, 1899, is in these words:

"It is ordered and adjudged that drain number ten in the pleadings mentioned is not now and was not at the time the damage complained of was sustained in a proper and sufficient state of repair owing to the neglect of the defendants to maintain the same, and by reason of such neglect the plaintiff's property has been injuriously affected and the plaintiff has thereby suffered loss and damage to the amount of \$250."

The defendants appeal chiefly upon the grounds (1) that the decision is based partly upon a view of the locality and does not contain a statement sufficient to enable this Court to form a judgment of the weight which should be given thereto, and that it does not state the effect given by the Referee to such view or inspection; (2) that he had no jurisdiction to order or direct the issue of a mandamus; (3) that there was no evidence to justify the assessment of any damages.

It appears from the Referee's judgment or decision that on the 13th of July, 1899, he inspected or viewed a portion of the drain and after therein describing the condition in which he found it, he proceeds to say: "From this inspection of the locality of the drain and the evidence of the plaintiff's witnesses and of some of the defendant's witnesses, I must find that drain No. 10 is not in a proper or sufficient state of repair; and that the said defendants have neglected to maintain the drain as required by law.

"And on the evidence I also find that this drain has brought down to the plaintiff's land by artificial means large quantities of water which have been poured into the creek, which the drain and creek are not in a proper state of repair to carry

off as rapidly as they are brought down to the plaintiff's lands, whereby the plaintiff's land has been flooded and her crops thereon damaged. And I assess the plaintiff's damages from such flooding at \$250, and award the plaintiff her costs of this action against the defendants.

"I also find that the plaintiff is a person interested in the said drain, and that her property has been injuriously affected by the condition of the said drain, and I direct that a mandamus do issue requiring the defendants to maintain the said drain as required by law."

There can be no doubt that in cases such as this the Referee may proceed partly on view. Section 97 of the Municipal Drainage Act, R. S. O. 1897 ch. 226, provides: "When the Referee proceeds partly on view or on any special knowledge or skill possessed by himself, he shall put in writing a statement of the same sufficiently full to allow the Court of Appeal to form a judgment of the weight which should be given thereto; and he shall state as part of his reasons the effect by him given to such statement." And sub-sec. 2 of sec. 89 requires him to "appoint the time for such inspection."

In the present case it is admitted that no appointment was made; the inspection or view was made by the Referee without notice to and in the absence of the parties, their solicitors or counsel. There is nothing to shew that they had any knowledge of the intention of the Referee to view or that he had in fact done so until his decision was handed out. Under these circumstances it would seem clear that the statement of the Referee concerning the condition of the drain when viewed by him cannot be considered by us. But it by no means follows that the finding must be set aside, if the evidence, apart from such statement, sustains the finding, as I think it does. This finding should, in my opinion, be affirmed.

Effect must, I think, be given to the objection that the Referee, under the circumstances here, was without power or jurisdiction to issue a mandamus. The section of the Municipal Drainage Act, under which he derives jurisdiction to direct the issue of a mandamus in cases such as this, is section 73. That section, so far as it relates to the issue of a

mandamus, is in the following terms: "Any municipality neglecting or refusing to maintain any drainage work as aforesaid, upon reasonable notice in writing from any person . . . interested therein, who or whose property is injuriously affected by the condition of the drainage work, shall be compellable, by mandamus issued by the Referee . . . to maintain the work, unless the notice is set aside or the work required thereby is varied as hereinafter provided. . . ."

It is settled law that the notice thereby required to be given is essential in order to vest in the Referee power to exercise the jurisdiction which the statute confers on him to issue a mandamus. For the defendants it is said that no notice was given; while the plaintiff relies on a letter, dated the 29th of July, 1898, and written by the plaintiff's solicitors to the defendants, as being a sufficient notice under sec. 73. That letter makes no reference to the condition of the repair of the drain. The complaint is that her lands had been injured, caused, in part, by water from the drain, constructed by the defendants, flooding them, and the demand therein made was, not that the defendants should repair the drain, but that they should construct and maintain a drainage work "required" to relieve her lands.

I do not think that letter can be treated as a notice under sec. 73.

Nor do I think that the defendants are precluded from objecting to the Referee's jurisdiction on that ground because they have not pleaded want of notice.

The Referee's jurisdiction to issue a mandamus being special or limited, exercisable only upon the notice prescribed by sec. 73 being given before action, it was for the plaintiff, who was invoking that jurisdiction, to prove affirmatively that notice had been given. And clearly as affecting that jurisdiction it was open to the defendants to take advantage of the want of notice at any stage of the action.

The point—not raised by the pleadings nor taken at the trial—urged by Mr. Wilson at bar, that the work was unauthorized because the by-law, before referred to, under which it was executed is invalid, is not, as it appears to me, in the

circumstances here, sustainable. Apart from the question as to how far the by-law was, by operation of the statute, validated by registration, I think upon the evidence and undisputed facts we would not be warranted in now declaring it invalid. Nor do I agree with Mr. Wilson's contention that the evidence clearly establishes that the work as originally constructed was not in conformity with the profiles and specifications. The learned Referee has not so found, and, after a full examination of the evidence, I cannot say that he was wrong in not making such a finding.

Then, with respect to the question of damages. The evidence confines any injury the plaintiff may have sustained to lot 18 in the 7th concession of West Luther, and as regards that lot she is entitled to recover for any injury to her use and enjoyment of it or which permanently depreciates its value, if caused by the failure of the defendants to keep the drain in question in repair. In the present case there was no evidence that the lot, by reason of the non-repair of the drain, has been permanently depreciated in value. The Referee allowed evidence that, owing to the insufficient capacity of the drain as constructed, the value of the lot has been depreciated, and in view of his finding as to damages, it would seem that it is based largely upon the assumption that the plaintiff was entitled to recover in this action for permanent depreciation in the value of the lot, arising from the insufficient size of the drain as originally made. It is clear that no such damages can be recovered in this action. Evidence was given for the plaintiff of loss of crops, pasturage, etc., due to the waters carried down by the drain flooding and overflowing her lands. On the other hand, there was much evidence that the lot, with the exception of some 25 acres, described by one or more of the witnesses as an "island," formed part of a great marsh. Other witnesses who had known the lot for many years, had, long before the drain was made, passed over it in a boat in the month of June, and other witnesses say that the drain is a benefit inasmuch as it enables the spring freshets to get off the land more quickly than they formerly



did. It seems to me that the lot will derive no substantial benefit from the drain in question until it is enlarged, as pointed out by Mr. Macdonald, O.L.S.—called as a witness for the plaintiff—at a cost, as estimated by him, of \$12,000. However that may be, it is clear the plaintiff is entitled to have the drain she has paid for kept in a reasonable state of repair: per Osler, J.A., *Stephens vs. Moore* (13).

On the whole, the evidence leads me to the conclusion that, while it cannot be said there is no evidence which would warrant a finding in favour of the plaintiff for some damages, the sum awarded is greatly in excess of any injury the plaintiff could have sustained in consequence of the non-repair of the drain. I think \$50 would be a liberal compensation for the injury for which she is entitled to maintain this action. It follows that, in my opinion, the appeal ought to be allowed so far as it relates to that part of the judgment directing the issue of a mandamus; that the judgment should be varied by reducing the damages to \$50; and that there should be no costs of the appeal to either party, except the costs occasioned by the unsuccessful objection to the jurisdiction, which must be borne by the defendants.

(13) (1898), 25 A. R. at p. 43.

COURT OF APPEAL, ONTARIO.

TOWNSHIP OF WARWICK VS. TOWNSHIP OF BROOKE.

Reported 1 O. L. R. p. 433.

*Status of Petitioners—Finality of Assessment Roll—Farmers' Sons  
—Assessment—Injuring Liability,*

In proceedings under the Drainage Act the assessment roll is conclusive as to the status of the persons mentioned in it, and evidence is not admissible to show that a person entered on the roll as owner is in fact a farmer's son and has been entered on the roll as owner by the assessor's error.

Judgment of the Drainage Referee on this point reversed, Armour, C.J.O., dissenting, but affirmed per Curiam on other grounds.

Per Referee:—It is the engineer's duty in making an assessment to make such an examination of each lot as will enable him to determine the part of the lot actually affected. Question of "injuring liability" discussed.

The appeal of the township of Warwick from the engineer's report was heard before the Drainage Referee at Sarnia on the 19th, 20th and 21st days of October and the 15th, 16th and 17th days of November, 1899, and the following judgment was given on the 29th of January, 1900.

Thomas Hodgins, Q.C., Referee :—

The proceedings in this case were initiated by a petition, but on the evidence I found that the petition had not been signed by a majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners), as shown by the last revised assessment roll to be the owners of the lands to be benefited in the drainage area described in the petition.

Subject to the objection that this finding invalidated the proceedings of the respondent council and their engineer, the case proceeded.

The proposed drainage work is the improvement of the McDonald or Flat Creek from the outlet of a drain constructed in 1891 as the "Edgar Drain," down to about two rods west of lines 20 and 21 in the 11th concession of the township of Brooke.

The Edgar drain is the channel through which the drainage waters from some of the lands in the township of Warwick near the townline and the drainage waters of the township of Brooke from that townline, are carried to their present outlet. And the proposed new work is intended to carry those drainage waters and also the drainage waters from the adjoining lands down to the proposed outlet in the 11th concession.

The channel of the Flat Creek runs through flats for the whole distance of the proposed work. The flats are said to comprise from 88 to 90 acres, of which about 14 acres would be taken for the new channel. The cost of the proposed work is estimated at \$2,305.

In assessing the lands along the course of the drain the engineer has assessed the lands in the flats for "benefit," but he has assessed the lands immediately adjoining and above the flats belonging to the same farms for "injuring liability," as shown by the following evidence :

"What distance beyond the flats have you assessed for benefit ? I have not assessed beyond the flats for benefit.

"Have you assessed land which lies outside the words 'Edge of creek flats' ? Not for benefit.

"How does the water beyond the mark 'Edge of creek flats' drain ? That comes in through these gulleys.

"Are the lands that are so drained through those gulleys assessed for any part of the charge ? They are assessed for injuring liability only."

And he further stated, "I guess they all have drains," and that farmers' drains carry the water down from the upper land to the flats and injure them ; and because the flats are so injured, he says he has assessed the lands immediately above them for "injuring liability."

From this evidence it appears that the engineer has misapprehended the meaning of the term "injuring liability," and its application to the higher lands of the owners of the flats along this proposed work.

"Injuring liability" may be defined as the act of a municipality, company or individual in causing water by any arti-

ficial means to flow upon and injure the lands of another municipality, company or individual, and for the cost of the construction and maintenance of a drainage work of sufficient capacity to relieve the lands from the injury caused by such water, the lands and roads of the offending municipality, company or individual may be assessed.

The term, therefore, cannot be held to apply to the case of an individual owner of lands adjoining the proposed drainage work merely because the water from one portion of his lands flows upon and injures another portion of the same owner's lands.

There is no evidence in this case to warrant a finding that the engineer's assessment for injuring liability would amount to the same as an assessment for benefit alone, or for benefit and outlet; for when questioned he stated that he could not give the figure basis of the assessment, and added that he did not know how the Referee was to know on what his assessment was based as to lots and as to townships. And when asked by counsel for the respondent township whether he determined to start with an acreage assessment for benefit, he answered, "I did not do that at all; I fixed it in a lump sum"; and again, "Can't you give us the figures by which you arrive at these different assessments? A.—No, I cannot."

In *Chatham v. Dover*, (1) it was held to be the duty of the engineer, where a drainage work would benefit lands and roads to assess and charge each of the lots and roads with the amount of the actual benefit to be received by each.

That this process of assessment has not been followed by the engineer is shown by the following answers:

"What will be the enhanced value of these ninety acres? A.—It is very difficult to state.

"How, then, can you arrive at the assessment for benefit if you cannot value what the benefit will be? A.—I am talking generally of what the benefit will be.

"Do you say you have not formed an opinion as to this enhanced value? A.—I cannot answer as to the enhanced value.

"Then you have not formed any opinion as to the enhanced value? A.—Not in figures."

Further on, after an answer that lots which had no artificial work should not be assessed, the following occurred:—

"Well, how is it that in this case I understand you have assessed some lots which have no artificial work? A.—Simply I have done so because a man could not spend the time to go to work and find out all the artificial work. I simply took it generally and scattered it per acre in this case because I found so much artificial work that I thought it was general, and if I have erred it was in assessing lots that have no work."

Under the sixth section of the Act it is the duty of engineer, in assessing the lands liable for the cost of the proposed work, to ascertain "the part of the lot actually affected" by the drainage scheme he reports, and he can only do so by making such an examination of each lot (such an examination as an assessor would be bound to make), as will enable him to determine whether the assessment should be placed against "the quarter, half or whole lot containing the part affected."

On the evidence I find this has not been done, and it is, therefore, impossible to sustain the report of the engineer in so far as it proposes to assess the lands of both townships for the cost of this drainage work.

There is also sufficient evidence to warrant a finding that the acreage for which the appellant township is assessed is more than ought to have been assessed; and also that the engineer has added to the cost of the proposed drainage work the cost of some farm bridges which should not have been allowed.

I must, therefore, allow the appeal with costs.

An appeal from this judgment by the township of Brooke was argued before Armour, C.J.O., Osler, Moss and Lister, JJ.A., on the 13th and 14th November, 1900.

Aylesworth, Q.C., and John Cowan, for the appellants.

Shepley, Q.C., W. J. Hanna, and John R. Logan, for the respondents.

1901, March 2. Armour, C.J.O.:—

The petition for the drainage work in question purported to be of a majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners) as shown by the last revised assessment roll of the township of Brooke to be the owners of the lands to be benefited, and prayed that the area of land therein described might be drained by means (1) of a drain or drains, and (2) deepening, straightening, widening, clearing of obstructions or otherwise improving the stream, creek, or watercourse known as McDonald or Flat Creek.

This petition was not dated, but was presented to the council of Brooke on the 13th of June, 1898, and it was on that day resolved by the said council that the said petition be received and the engineer instructed to make examination and survey of said stream, prepare plans, estimates, and assessments, and report to the council.

The "last revised assessment roll" is defined by the Assessment Act, sec. 2, sub-sec. 11, to mean the last revised assessment roll of a local municipality: "And an assessment roll shall be understood to be finally revised and corrected when it has been so revised and corrected by the Court of Revision for the municipality or by the Judge of the County Court on appeal as by this Act provided, or when the time within which appeal may be made has elapsed."

The assessor shall begin to make his roll in each year not later than the 15th of February, and shall complete the same on or before the 30th of April. Notice of appeals to the Court of Revision is to be given within fourteen days after the day upon which the roll is required by law to be returned, or within fourteen days after the return of the roll in case the same is not returned within the time fixed for that purpose.

The first sitting of the Court of Revision is not to be held until after the expiration of at least ten days from the expiration of the time within which notice of appeals may be given.

The rolls are to be finally revised by the Court of Revision before the 1st of July in every year.

Notice of appeals to the County Judge is to be given within five days after the date limited for the closing of the Court of Revision.

The assessment roll for the township of Brooke for the year 1898 was finally passed by the Court of Revision on the 30th of May, 1898, and no appeals were had to the County Judge, but I do not think that this roll could properly be said to be the last revised assessment roll for the year 1898, even if no appeal was had to the County Judge, until the time within which an appeal might be made to him had elapsed.

It follows that the last revised assessment roll of the township of Brooke at the time the council received the petition and instructed the engineer in pursuance of it, was the last revised assessment roll for the year 1897, and, as we held in *Challoner v. Lobo*, (2) the proceedings under the petition must be governed by that roll.

On the last revised assessment roll of the township of Brooke for the year 1897, all the persons resident and non-resident appearing in respect of lands within the area described are eighteen in number, and no one is shown thereon to be a farmer's son or a tenant, but every one is shown thereon to be an owner.

And it is contended that all being shown by the assessment roll to be owners, the assessment roll is conclusive evidence that they are such, and that no evidence is admissible to show that they are not what they are shown by the assessment roll to be.

That although the petition requires to be signed by a majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners) as shown by the last revised assessment roll to be the owners of the lands to be benefited in the described area, and although there are farmers' sons not actual owners on the assessment roll, yet because they are not shown on the roll to be farmers' sons, but are shown on the roll to be owners, no evidence can be

received to show that they are farmers' sons not actual owners, so as to exclude them.

In my opinion, however, evidence is admissible to show that farmers' sons not actual owners, who are not shown on the roll to be farmers' sons but are shown thereon to be owners, are in truth farmers' sons and not actual owners.

The law does not say exclusive of persons shown by the roll to be farmers' sons, but exclusive of farmers' sons not actual owners, and as a farmer's son may be assessed as an owner without being an actual owner, evidence is admissible to show whether or not he is a farmer's son and whether or not he is an actual owner.

Section 2 of the Drainage Act, sub-sec. 7, declares that "owner" or "actual owner" shall include the executor or administrator of an owner's estate, the guardian of an infant owner, any person entitled to sell and convey the land, an agent of an owner under a general power of attorney or under a power of attorney empowering him to deal with lands, and a municipal corporation as regards highways under their jurisdiction.

This leaves the words "owner" and "actual owner" undefined, but, having regard to the provisions of the Act, I am of the opinion that no person can be held to be an owner within the meaning of that Act unless he is seised of an estate in fee simple in the land of which he claims to be the owner.

And this appears to have been the opinion of the Chief Justice of the Supreme Court in *McKillop v. Logan*, (3) as to the meaning of the word "owner" as used in the Ditches and Watercourses Act, and as to which a similar declaration as to what it shall include is contained therein.

And I am of the opinion that although sec. 3 of the Act provides that "upon the petition of the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners) as shown by the last revised assessment roll to be the owners of the lands to be benefited in any described area . . . the council may procure an engineer or Ontario land surveyor to make an examination of the



area to be drained," the persons whose lands will be affected and burdened by the proposed drainage work may appear before the council and object to the granting of the prayer of the petition on the ground of its not being sufficiently signed by reason of some of the signers thereof, although shown by the last revised assessment roll to be the owners of the lands to be benefited in the described area, not being in fact the owners thereof, and in case of the council proceeding to grant the prayer of the petition, may restrain them from so doing on this ground.

The council are not bound to grant the prayer of any such petition, and they can always protect themselves by refusing to grant the prayer of the petition until the petitioners satisfy them that they are not only shown on the roll to be the owners but are in fact the owners of the lands to be benefited in the described area.

The Referee, under the Drainage Act, is given, by sec. 89, sub-sec. 3, of that Act, express power "to determine the validity of all petitions"; and on an appeal to him from the report of the engineer, the appellants are entitled to show the invalidity of the petition on the ground of its being insufficiently signed by reason of some of the signers thereof, although shown by the last revised assessment roll to be the owners of the lands to be benefited in the described area, not being in fact the owners thereof.

To hold that the validity of the petition cannot be attacked on this ground, and that the persons shown on the last revised assessment roll to be the owners of the lands to be benefited in the described area are to be conclusively held to be such owners, and that no evidence is admissible to show that they are not in fact such owners, would be to put a construction upon the Act which might be productive of much injustice.

Persons having no interest whatever in the lands to be benefited in the described area might, merely by reason of their being shown upon the last revised assessment roll to be the owners of lands to be benefited in the described area, be instrumental in procuring a work to be done for the drain-

age of the described area against the wishes of a majority of the real owners of the lands to be benefited in the described area, and in imposing heavy burdens in respect of such drainage upon all whose lands were assessable by reason thereof.

There is nothing in the Act which, in my opinion, compels us to put a construction upon the Act which would open the door to such injustice as would be likely to follow from it.

It was conceded by counsel that W. W. Harrison, one of the parties signing the petition in this case, was not an actual owner, but was assessed as such by reason of his being a farmer's son, and this concession had the effect of destroying the majority. The evidence showed that Robert J. Pollock, another signer of the petition, was not an actual owner, but was assessed as such by reason of his being a farmer's son. It also showed that John Scott was not an actual owner, and if entitled to be on the assessment roll at all it was only by reason of his being a farmer's son, and he was also a signer of the petition.

These three farmer's sons, not actual owners, being excluded, there only remain seven signers of the petition as against eighteen, the whole number of persons shown by the last revised assessment roll to be the owners of lands to be benefited in the described area. The evidence further showed that J. B. Harrison, who signed the petition, had no interest in the land in respect of which he was shown by the roll to be the owner, but that it belonged to his wife. It also showed that John Bowie, one of the eighteen who did not sign the petition, was not an owner, but merely a tenant of the land in respect of which he was shown by the roll to be the owner.

The Referee was, therefore, in my opinion, right in determining against the validity of the petition.

It was contended that the proceedings taken in this case by way of petition might have been taken for the like purpose by the council without any petition under the provisions of sec. 75 of the Act, and that the proceedings under the petition might be upheld as if taken under that section, but the answer to this is that the council did not profess to act upon their own motion under sec. 75, but only upon petition under

sec. 3, and we cannot assume that they would have acted of their own motion under sec. 75 or otherwise than by petition under sec. 3.

It may also be questioned whether they could do under sec. 75 what it was the object of the petition and report made thereon should be done, having regard to the decision of the Supreme Court in *Sutherland-Innes Co. vs. Romney* (4).

As to the report of the engineer in this case, it is not necessary to say anything on account of the conclusion at which I have arrived, but I may say that the expenditure seems large for the benefit to be gained, and it appears at least doubtful if the proposed work is to be carried to a proper outlet.

In my opinion the appeal must be dismissed with costs.

Osler, J.A. :—

In considering whether for the purpose of taking action upon a petition for a drainage by-law the question of the ownership of the petitioners' lands is concluded by the assessment roll, it may be well to note the changes which have been made from time to time by the Legislature in the clause which prescribes the manner in which and the persons by whom the council may be set in motion.

In 1866 the petition must have been signed by the majority of the resident owners: 29 & 30 Vict. ch. 51, sec. 281.

In 1868-9, by a majority in number of the resident or other owners: 32 Vict. ch. 43, sec. 1 (O.).

In neither case is there any reference to the assessment roll.

In 1869 the majority is to be of the "resident owners as shown by the last revised assessment roll, or a majority of the non-resident owners, or a majority of all the owners": 33 Vict. ch. 26, sec. 14 (O.).

Under this Act, if the petitioners were non-resident owners, or if that class was to be considered in ascertaining whether the petition had been signed by a majority of all the owners, an enquiry into their actual status was involved, since

their names, being the names of non-residents, would not, as such, necessarily appear upon the assessment roll, which is referred to in connection only with the resident owners.

In 1873 the right of non-resident owners to petition, whether their names appeared upon the roll or not, was taken away, and the majority required is to be of the owners as shown by the last revised assessment roll to be resident on the property to be benefited: Consol. Mun. Act, 36 Vict. ch. 48, sec. 447 (O.).

Under this Act the roll seems to be made the test not of ownership but of residence only: "owners as shown to be resident." Non-resident owners might have required their names to be entered upon the roll, but this would not have given them the right to petition.

In 1874 an Act was passed [37 Vict. ch. 20, sec. 1 (O.)] which, though not repealing the provisions of the Act of 1873, enacted that the council might be set in motion on the petition of the majority in number of all the owners, whether resident or non-resident, of the property to be benefited, and the assessment roll is not as to either class made a test either of ownership or residence. It is important to notice that by this Act the authority of the council is declared to be the same on a petition so signed as upon the petition of the majority in number of owners shown by the last revised assessment roll to be resident on the property to be benefited.

The provision made by this section is, I think, strong to show that the assessment roll was not intended by the Legislature to be conclusive of ownership in the case of residents, but was merely intended to indicate one class of persons who might be petitioners. It can hardly be supposed that the Legislature intended that the question whether the roll should be conclusive or not as regarded that class, should depend upon which Act the petitioners initiated their proceedings under—that of 1873 or that of 1874.

Up to this time, therefore, I think there can be but little doubt that the authority of the council to entertain a petition depended upon the fact of ownership of the lands by the petitioners, and that the assessment roll was not the final test or conclusive evidence of that fact.

It is in the Revised Statutes of 1877 that we find the language of the clause settled as it has practically ever since remained. The revisers of the statutes, taking the sections of the Acts of 1873 and 1874, framed sec. 529 of the Municipal Act, R.S.O. 1877, ch. 174, thus: "In case the majority in number of the persons as shown by the last revised assessment roll to be the owners (whether resident or non-resident) of the property to be benefited," etc.

This language is retained without alteration in the subsequent general Municipal Acts of 1883, 46 Vict. ch. 18, sec. 570 (O.); R. S. O. 1887 ch. 184, sec. 569; and 55 Vict. ch. 42, sec. 569 (O.).

In the last-mentioned year the Assessments Acts were also consolidated by 55 Vict. ch. 48 (O.).

By section 14, one of the duties of the assessor is to prepare an assessment roll in which he is to set down a multitude of particulars in the proper columns of the roll, inter alia, in column 4 the letters "F.S." where the party assessed is a "farmer's son" within the meaning of the Municipal Act. And by sec. 14a, sub-sec. 2 (f), a person who is entitled to be placed on the roll as a farmer's son may also require himself to be entered and rated thereon as a joint or separate owner, occupant, or tenant, as the case may be, of the farm with his father, the real owner, and the initials "F." or "T." are in that case to be added in the proper column. It is unnecessary to go back to the origin of this extraordinary and dangerous enactment, but its effect or possible effect upon the right of the council to construct drainage works under the relative clauses of the Municipal Act seems not to have occurred to any one until after the passage of the Municipal Act of 1892.

In the year 1894 these clauses were embodied in a separate Act, "The Drainage Act of 1894." In sec. 3 (1) of that Act we find the final touches given to the main facultative section, which now reads: "Upon the petition of the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners) as shown by the last

revised assessment roll to be owners of the lands to be benefited in any described area, etc.”

This Act is now found in the Revised Statutes of 1897, ch. 226, “The Municipal Drainage Act,” and the language of sec. 3 (1) thereof is the same as that of the corresponding section of the Act of 1894.

The words “exclusive of farmers’ sons not actual owners” now found in the section were evidently inserted in consequence of the provisions of the Assessment Act of 1892 above referred to.

The evidence in the present case shows, beyond a peradventure, that the assessor neglected his duty in preparing the roll relied on as supporting the petition and by-law. He inscribed therein the names of certain persons as owners whose only right to be there in that quality was as farmers’ sons, and by neglecting to insert in the proper column the letters “F.S.” opposite their names, he omitted to show that these persons were farmers’ sons, and, therefore, not actual owners.

It is contended that the assessment roll is, nevertheless, conclusive of their status as actual owners; that the assessor must now be assumed to have done his duty, and that the persons referred to must be regarded as qualified petitioners, in short, as owners, and cannot be excluded as being “farmers’ sons not actual owners.”

In the reasons of appeal it seems to be conceded that the Referee might have entered upon an enquiry as to this, but upon the argument the more “thorough” position was taken up, and the right to go behind the assessment roll and to make any enquiry into the status of the petitioners, save as disclosed thereby, was denied.

The case of *In re Montgomery and Raleigh* (5) was decided under the Act of 1869, 33 Vict. ch. 26, sec. 14. It was a motion to quash a drainage by-law on the ground (*inter alia*) that the petition had not been signed by a majority in number of the resident owners of the property mentioned in the by-law, nor had a majority in number of all the owners

of the property to be benefited petitioned the council for the drainage.

Gwynne, J., said: "The petition appears to have been signed by a majority of the resident owners of the property assessed. However that may be, in my opinion the objection is not open to the applicant upon this application. I am not prepared to say that if a council, in violation of the apparent fact that a sufficient number to put the council in motion had not petitioned, such fact being made apparent in the manner indicated in the 194th and 195th sections of the Municipal Act, 29 & 30 Vict. ch. 51, should nevertheless proceed to pass a by-law imposing rates, that such a by-law could be sustained on a motion to quash. But in the absence of all suggestion of fraud and of all opposition to the by-law when before the council on the ground taken, I think that a by-law which recites that a sufficient number had petitioned should be taken to be true, at least unless the recital be clearly established to be glaringly untrue, so as to afford a presumption of fraud."

There does not appear in this case to have been any question raised as to the status of the petitioners as ascertained by the assessment roll, but we now have to deal with a clause which more clearly and expressly affirms the finality of the roll than did sec. 13 of the Act of 1869.

The best opinion I have been able to form upon the subject, after a good deal of consideration, is that the assessment roll on which the council is required to act, if they act at all, is conclusive upon the question of the petitioners' status.

The petitioners must be persons who are shown by the assessment roll to be the owners of property to be benefited. They are, therefore, persons named in the roll. Non-residents who have not procured their names to be inserted therein under sec. 3 of the Assessment Act, and whose lands are, therefore, to be assessed under section 21 as lands of non-residents, are not qualified petitioners or to be taken into account in ascertaining the requisite majority.

The Legislature must have meant to give some effect to the assessment roll by referring thereto in successive Acts, from R. S. O. 1877 hitherto, in uniform phraseology different

from that which had been used in earlier Acts on the same subject. The *prima facie* meaning of the expression "resident and non-resident persons as shown by the last revised assessment roll to be the owners" is that the roll establishes the qualification of such persons as owners. Nor is it unreasonable to hold that the Legislature meant what it appears to have said. Before the roll could have become finally revised there were two opportunities for dealing with the question of ownership: first, by an appeal to the Court of Revision and then by an appeal to the County Judge, and these appeals were open to all whose names appeared on the roll, or who, being non-resident, had, or might have, required their names to be placed thereon.

It can hardly have been intended that the council, when dealing with the petition, and having the roll to guide them, should enter upon another enquiry into the question of ownership. If such may be had, it is difficult to see what effect remains to be given to the roll, why it should have been referred to, or what purpose it could in that case serve. Then it may be observed that the Act provides no machinery for entering upon such an enquiry before the council. Subject to the limited enquiry permitted under secs. 336 and 337 of the Municipal Act, the council are referred to the assessment roll as their authority for entertaining the petition and referring the matter to their engineer. Equally improbable does it appear that the Legislature should have intended that after the expense of a survey, examination, and advertisement, etc., had been incurred, it should be open to anyone to upset these proceedings by instituting a costly enquiry into the status of the petitioners.

Sections 16, 17, and 18 of the Drainage Act confirm this view of the meaning of sec. 3 (1). They provide for giving notice to parties interested of the filing of the engineer's report and for calling a meeting of the council for its consideration by the ratepayers, and for enabling petitioners to withdraw or other persons qualified to add their names thereto, and section 18 enacts that should the petition at the close of



the meeting contain the names of the majority of the "persons shown as aforesaid," i.e., by the last revised assessment roll "to be owners benefited" within the area described, the council may pass the by-law. Here, again, there is no reference to any other mode of ascertaining the ownership or of enquiring into the accuracy or contesting the finality of the roll.

I do not think the section admits of an enquiry in the case of farmers' sons more than in the case of other persons who appear upon the roll to be the owners. It takes the roll as finally revised and gives effect to it. If there are farmers' sons entered thereon, as they may be, as owners, they are excluded by the terms of the section if they are also shown by the roll, as they should be, to be farmers' sons. But, if they are not shown to be farmers' sons, they are shown to be owners simply. That is the record of the roll as settled by the two Courts through which it has or may have passed. Once it is made clear how the roll should be made up, and what it should show, there is nothing in the grammatical construction of the section which permits of an enquiry in the case of farmers' sons more than in that of others. The record of the assessment roll is, I think, conclusive for the purpose of conferring jurisdiction upon the council to entertain the petition.

On what may be called the merits of the case, I am not disposed to differ from the view which has been taken by the Referee; and there is, moreover, much in the recent judgment of the Supreme Court in the case of *Sutherland-Innes Co. v. Romney* (6), which would make it difficult to sustain the report of the engineer on which the council proposed to found their drainage by-law. On the whole, my vote must be cast for the dismissal of the appeal. Costs must follow.

Moss and Lister, J.J.A., concurred with Osler, J.A.

## COURT OF APPEAL, ONTARIO.

In the matter of an Appeal by the Corporation of the Township of Elma from a report of William F. VanBuskirk, C.E., dated the 12th of November, 1898.

THE TOWNSHIP OF ELMA VS. THE TOWNSHIP OF ELLICE.

*Damages and Costs—Assessment for—R. S. O. 1897, ch. 226, secs. 86 and 95.*

Damages and costs, including costs of defence, payable by a municipality in respect of actions arising out of drainage works, may be assessed against the lands and roads originally assessed for construction in proportion to their assessment, and each municipality which comprises any lands or roads so assessed is bound to pay over its proper proportion of the damages and costs to the initiating municipality.

The township of Ellice having constructed drainage works under different by-laws, referred to in the judgment, was condemned to pay in respect of such works large sums for damages and costs in different actions, also referred to in the judgment.

The council of Ellice passed a by-law, No. 374, on the 20th May, 1898, directing William F. VanBuskirk, C.E., to enquire into the said litigation and the payments made, or to be made, by the township of Ellice in respect thereof, and to report to the council of Ellice what moneys should be charged upon the lands and roads liable to assessment, and to make such assessment on such lands and roads in respect of said moneys properly chargeable thereon. Mr. VanBuskirk, having made his report and assessment on the 12th of November, 1898, a copy was served on each of the townships of Elma, Logan and Mornington, whereupon the council of Elma served a notice of appeal upon the township of Ellice and also upon the townships of Logan and Mornington, protesting that the said report of the engineer was irregular,

illegal and void, and appealing therefrom and from the assessments of the engineer, so far as the same were subject to appeal or within the jurisdiction of the Drainage Referee.

The appeal was heard at Stratford on the 9th of June, and 26th to 30th of September, inclusive, 1899.

Mr. Idington, Q.C., for the appellant.

Mr. Matthew Wilson, Q.C., for the respondent.

The following judgment was delivered on the 17th March, 1900, by

Thomas Hodgins, Q.C., Drainage Referee:—

The by-laws of the respondent municipality for the construction and extension of the Maitland drainage work respecting which the various actions referred to in the proceedings herein were brought against that municipality are as follows: The original by-law No. 198, providing for its construction through the appellant municipality of Elma and the municipality of Logan, and assessing certain lands and roads in these municipalities for the cost of the same was passed on the 18th May, 1885; an amending by-law (No. 216) to provide a further sum for the completion of the work, was passed on the 29th September, 1886; a by-law (No. 265) for the extension of the drain and a new outlet in the municipality of Mornington, and assessing certain lands and roads in the four municipalities for the cost of the same, was passed on the 29th September, 1890; a by-law (No. 278) for the improvement of the said drainage work, and assessing certain lands and roads in the said four municipalities for the cost of the said improvement, was passed on the 28th September, 1891.

The appellant municipality of Elma adopted the drainage schemes initiated by the above by-laws of the respondent municipality, and passed several by-laws to give effect to the same, and to assess the specific lands and roads within its jurisdiction affected thereby as follows: A by-law (No. 217)

to raise the sum required by Ellice by-law No. 198 to re-imburse that municipality for the cost of the said drainage work within Elma was passed on the 12th October, 1885. A by-law (No. 285) to raise the sum required by Ellice by-law No. 265, to re-imburse that municipality for payments made by it for the said drainage work within Elma as ratified by the arbitrators (by an award dated 23rd October, 1890) was passed on the 30th May, 1891. A by-law (No. 292) to raise the sum required by Ellice by-law No. 278 to re-imburse that municipality for payments made by it for the said drainage work through Elma, was passed on the 30th September, 1891.

The drainage work was commenced by the respondent municipality in 1885, and was constructed by it through the several municipalities above named; and during such construction the following actions for claims and damages consequent thereon were brought against the municipality:

**Partridge v. Ellice** was commenced on the 25th April, 1885, for damages caused to the plaintiff's land in Elma. The action was referred to an arbitrator, and resulted in an award dated the 18th November, 1889, against the defendant municipality for \$            damages and costs—in all \$572.84.

**Taylor v. Ellice** was commenced on the 21st July, 1890, for damages caused to the plaintiff's lands in Elma, and resulted in a judgment, dated the 16th September, 1890, against the defendant municipality for \$            damages and costs—in all \$520.35.

**Coxon v. Ellice** was commenced on the 21st July, 1890, for damages caused to the plaintiff's lands in Elma, and resulted in a judgment against the defendant municipality for \$150 damages and costs—in all \$375.35.

**Hiles v. Ellice** was commenced on the 18th November, 1890, for damages caused to the plaintiff's lands in Ellice. This case was referred to the former Referee under the Drainage laws, and was finally decided by the Supreme Court on the 31st May, 1894, and resulted in a judgment against the defendant municipality for \$160 damages and costs—in all \$767.96.

Crooks v. Ellice was commenced on the 14th August, 1891, for damages caused to the plaintiff's lands in Elma. It was also referred to the former Referee, and was finally decided by the Supreme Court on the 31st May, 1894, and resulted in a judgment against the defendant municipality for \$170 damages and costs—in all \$677.14.

The judgments in the two preceding cases are reported in Clarke & Scully's Drainage Cases, pp. 65-106.

Tyndall v. Ellice was commenced on the 5th May, 1893, for damages caused to the plaintiff's land in Elma, and resulted in a judgment of the former Referee, dated the 2nd April, 1895, which is reported in the same volume of Drainage Cases, pp. 247-253.

It will be seen that—except in the Hiles case—these actions for damages arose from or were consequent upon the construction of the drainage work by the respondent municipality within the limits of the appellant municipality of Elma. The policy and course of action of the appellant municipality during these actions and the difficulties experienced by the respondent municipality will be noticed further on.

There are two clauses in the municipal law which deal with the liabilities and expenses incurred by municipalities in the construction and maintenance of drainage works. One of these is section 86 of the Municipal Drainage Act, R. S. O. (1897) ch. 226, the legislative ancestor of which came into statutory life through the Drainage Act of 1882, 45 Vict. ch. 26, sec. 1, and which with some little legislative nursing has developed into the following:

“Except where otherwise provided by this Act, the cost of any reference (arbitration) had in connection with the construction or maintenance of any drainage work, the cost of the publication of service, of by-laws, and all other expenses incidental to the construction or maintenance of the work, and the passing of by-laws, shall be deemed part of the cost of such work, and be included in the amount to be raised by local rate on all lands and roads liable therefor.”

Through the same Act of 1882 what may be designated as the legislative twin of the above also came into statutory being, and under similar legislative nursing up to 1886 had developed into the following in R. S. O. (1887) ch. 184, sec. 592, and 55 Vict. ch. 42, sec. 592, during the litigation above mentioned, and continued up to the 5th May, 1894, when it ceased to exist except in so far as section 114 of the Drainage Act of that year, 57 Vict. ch. 56, permitted.

“Where, on account of proceedings taken under this Act or the Ontario Drainage Act, or the Acts respecting drainage works and local assessments therefor, damages are recovered against the corporation or parties constructing the drainage works, or other relief is given by any judgment or order of any Court, or any award or order made by the Referee under this Act, all such damages, or any sum of money that may be required to enable the corporation to comply with any such judgment, order or award made in respect thereof, shall be charged pro rata upon the lands and roads liable to assessment for such drainage works.”

These, then, were the statutory guarantees of the respondent municipality during or at the close of the contests forced upon it by the respective litigants above named—their respective judgments and orders dating from 1889 to 1894—before the legislative rules prescribed by section 97 of the Drainage Act of 1894 affecting damages and costs arising from proceedings taken under that Act, were promulgated. The effect of these statutory guarantees, I think, clearly entitled the respondent municipality to be indemnified against all charges and expenses properly incurred by it and incidental to the construction and maintenance of the drains in question.

But apart from these statutory guarantees there are other grounds upon which this municipality's claims for indemnity may be sustained. In working out these drainage schemes the initiatory municipality does not work them out for the benefit of the ratepayers of the whole municipality, but only for the benefit of the co-adventuring ratepayers within the

limited and described drainage area. When set in motion by the petition of certain ratepayers the municipality thereby becomes a trustee of the powers of construction and of assessment conferred by the Acts, as well as in the fullest sense the trustee for the municipalities and co-adventurers for whose benefit the drainage work is undertaken, and in which their moneys are invested. To the creditors from whom the moneys are borrowed on debentures, the constructing municipality becomes their only and primary debtor. But as between itself and the drainage co-adventurers and the other municipalities representing their drainage co-adventurers it becomes their surety, and they are bound to indemnify and save it harmless from all expenses and liabilities properly incurred in the construction of the drainage work undertaken for their benefit.

"It is," said Lord Eldon, in *Worrall v. Halford* (1), "in the nature of the office of trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all his charges and expenses incurred in the execution of his trust." See further *Lewin on Trusts* (2).

And in *Re Exhall Coal Company* (3) it was held that the trustee for a public company who had paid or had become responsible for certain liabilities of such company was entitled to a first charge on, and should be indemnified out of the proceeds of the sale of the company's assets in priority to the claims of its debenture-holders. And I think it may be said that our statute R. S. O. (1897) ch. 129, sec. 1, only puts into statutory form what has been the law of the Courts of Equity respecting the indemnity of trustees from the earliest times.

Another and a further ground which would warrant a finding in favor of this respondent municipality, is disclosed in the following evidence given by the reeve of the appellant municipality in answer to my questions:

Q.—You have said that it was always plain and clear to you that the drain had been constructed through an improper locality. A.—Yes, sir.

(1) 8 Ves. at p. 8.

(2) 10th ed. pp. 730, et seq.

(3) 35 Beav. 440.

Q.—And did the other members of your council hold the same view? A.—Well, I can remember that myself and the deputy reeve, Mr. Loughhead, were sent to look over the thing for ourselves, and we both came to the conclusion that it was decidedly wrong and a big mistake.

Q.—Then why did not you, as reeve, or why did not the council of Elma, as representing the parties affected, notify Ellice when you received the plan of the proposed scheme, that it was through an improper locality? A.—Well, it was simply this: that I made up my mind I would let the township of Ellice do their own work, and, if there was anything wrong let them bear the consequences, and if they were right it was so much the better; that I would keep my hands out of it, and so I did.

Q.—And was that fair treatment to a neighbouring municipality which had undertaken a very heavy financial responsibility, not only for their own township but for yours, and for ratepayers within the drainage area? A.—No, I don't know that it was; but if your honour just listens to me I might say that it was the first drain that we ever had to handle in Elma.

Q.—A man's sense of right should lead him, if he thought his neighbour was making a mistake, and if he was on friendly terms with him, to give him a hint of his mistake. A.—That is all right. We could do it in this case. We knew a little better.

It is reasonable to assume that the members of the Elma council had a better knowledge of the physical features and natural formation of their township than the members of the Ellice council, and that according to the common and well recognized rules of fair dealing they should have called the attention of the initiating municipality to what they considered to be defects in the proposed drainage scheme.

The policy and course of action disclosed in the reeve's evidence brings, I think, this appellant municipality within the principles of equity which apply to the case of a party standing by while another is doing an act which the party



standing by subsequently seeks to take advantage of or repudiate. These principles of equity, said Lord Chelmsford, in *Ramsden v. Dyson* (4), consider that when one sees the mistake into which another has fallen, it is the duty of that one to be active and state his objections or his adverse title, and that it is wilfully dishonest to remain wilfully passive in order afterwards to profit by the mistake which he might have prevented.

Subject to the reference of the bills of costs of defence in the above actions to one of the taxing officers of the High Court with the usual direction in trustee cases, the appeal of the municipality of Elma is dismissed with costs.

As the municipalities of Logan and Mornington had not availed themselves of the right of appeal given by the Act, I cannot recognize their right to join in Elma's appeal, and they must pay whatever costs has been incurred by Ellice in resisting their right to appear and join in the appeal.

(4) L. R. 1 H. L. at p. 141.

COURT OF APPEAL, ONTARIO.

HENRY PRIEST AND THE TOWNSHIP OF VESPRA VS. THE  
TOWNSHIP OF FLOS.

Reported 1 O. L. R. 78.

*Alteration of Report, Plans and Specifications, after Adoption by  
Council.*

Before the report, plans and assessment of the engineer for a drainage scheme have been adopted by the council, it can refer them back to him for further consideration or for amendment, but after they have been adopted it cannot of its own motion change or amend them, and if the drainage scheme is carried out with a material change the municipality is not protected, and is liable to make good any damages resulting from the work.  
Judgment of the Drainage Referee affirmed.

The facts are stated in the judgments.

The Drainage Referee, Mr. Thomas Hodgins, Q.C., having shortly stated his conclusions, the following formal judgment was settled:

IN THE MATTER OF THE MUNICIPAL DRAINAGE  
ACT.

Between—

Henry Priest and the Corporation of the  
Township of Vespria,

against

The Corporation of the Township of Flos,

AND

IN THE HIGH COURT OF JUSTICE.

Between—

Henry Priest and the Corporation of the  
Township of Vespria,

Plaintiffs,

and

The Corporation of the Township of Flos,  
Defendants.

Before the Drainage Referee.

Wednesday, the 4th day of April, 1900.

Whereas proceedings were commenced in the first above mentioned cause by notice pursuant to section 93 of the said Municipal Drainage Act;

And whereas an action was subsequently commenced in the High Court of Justice as secondly set forth above;

And whereas by an order made in the said action bearing date the 5th day of September, A.D. 1899, it was ordered that any claims made in the said action referable under the Municipal Drainage Act after action which could not be enforced in the reference under section 93 of the said Act then pending before the Drainage Referee if any such claims there were, should be and the same were thereby referred to the said Drainage Referee, both references to proceed concurrently as one reference;

And whereas pursuant to an appointment issued by me. the said reference so directed came on for trial at the town of Barrie in the presence of counsel for all parties, and was tried on the 5th to the 9th days of December, 1899, and the 15th to the 17th days of February, 1900, and having heard the evidence adduced, and what was alleged by counsel aforesaid, it was ordered that the same should stand over for judgment, and coming on this day for judgment in the presence of counsel aforesaid, I find and declare as follows:—

1. That during the years 1897, 1898, and 1899 the defendants, the corporation of the township of Flos, made and constructed a certain drain through Marl Creek in the said township mentioned and referred to in the statement of claim herein, and they did so for the purpose of draining a large marsh known as Phelpsston Marsh, having an area of about 2,500 acres.

2. That the drain in question in this action is not the drainage work described in the engineer's report dated the 5th August, 1897, recited in the by-law, nor the work proposed to be authorized by the provisional by-law adopted by the defendant's council on the 21st of August, 1897, and published in a newspaper on the 26th of August, 1897; that the drainage work proposed to be constructed pursuant to the said report and provisional by-law was changed by the council

or court of revision before the final passage of the by-law on the 9th October, 1897, but that no new by-law was provisionally introduced, nor the former provisional by-law amended so as to set out the proposed change in the said drainage work, nor re-published, before the final passage of the said by-law on the said 9th October, 1897; that the drain actually constructed was a longer, deeper, and more expensive work than that prescribed and proposed in the said report of the engineer and said provisional by-law.

3. That the said drain enlarged the channel and capacity of Marl Creek and has thereby caused to be brought down larger quantities of water, and with greater speed from the Phelpsston marsh and upper lands through the channel of Marl Creek on the lands of the said plaintiff Priest than had usually flowed down prior to the construction of the said work by the said defendants.

4. That the water so brought down has overflowed from the said Marl Creek on to the lands and crops of the said plaintiff, and has damaged the same to the amount of \$200.

5. I further find and declare that the causes of actions or claims of the plaintiffs recoverable herein are claims that were referable in the said action and could not be enforced in the reference under section 93 of the said Drainage Act.

6. It is therefore ordered and adjudged that the said plaintiff Priest do recover against the said defendants the sum of \$200 damages.

7. It is further ordered that unless the said defendants do within one year from this date take the necessary proceedings to relieve the said plaintiff Priest's land and crops from damage, caused by the waters of the said drain, an injunction do issue in this action restraining the said defendants from causing any such damage to the lands and crops of the said plaintiff Priest, or discharging of the waters of the said marsh area down the said work and the said Marl Creek with greater velocity and in greater quantities than came down before the construction of the said drain, but this is to be without prejudice to the plaintiffs or either of them taking any proceed-

ings for the recovery of damages which either may in the meantime sustain.

8. It is further ordered that the defendants do pay to the plaintiff Priest his costs of the said action, proceedings and reference other than the costs provided for in the said order of reference dated the 5th day of September, 1899, such costs to be taxed. No costs to the township of Vespra.

An appeal by the defendants from this judgment was argued before Armour, C.J.O., Osler, Moss and Lister, J.J.A., on the 19th and 20th of November, 1900.

Matthew Wilson, Q.C., and W. F. Lent, for the appellants.

C. E. Hewson, for the respondents.

1901. January 7.

The judgment of the Court was delivered by

Lister, J.A.:—

The plaintiff Priest was the owner in fee and occupant of the south-east quarter of lot 1 in the 9th concession of the township of Vespra, which township is situate to the south of and adjoins the township of Flos.

In the latter township there was a large swamp, marsh, or basin, comprising some twenty-four hundred acres, and known as Phelpston Marsh, in which, during the spring, summer and fall freshets, the surface water of the surrounding country accumulated.

The only outlet for the waters of this marsh was a creek or watercourse known as Marl Creek, which took its rise in the marsh and ran in a southerly course through the 4th, 3rd, 2nd and 1st concessions of the township of Flos, across into the township of Vespra, through the west half of lot 1 in the 8th concession of the latter township, thence westerly through the lands of the plaintiff Priest, and thence southerly and westerly to the Nottawasaga River, into which it discharged its waters.

The marsh being deeper than the head of the creek, a large part of the marsh waters were not carried off, but remained therein.

With the design of reclaiming the marsh lands by lowering the water therein, certain freeholders of the township of Flos, in the month of December, 1896, acting under sec 3 (1) of the Municipal Drainage Act, petitioned the municipal council of the township of Flos to drain the marsh.

The scheme thus petitioned for involved not only the enlargement of a portion of Marl Creek, but the digging of canals and ditches through the marsh; and by resolution the council referred the petition to Mr. Gaviller, P.L.S., with instructions to take the levels of the marsh lands and to proceed in accordance with the Drainage Act, and to report to the council; and he was subsequently instructed by resolution of the council to make final estimates, and to prepare specifications and plans of the work, etc.

Accordingly, on the 5th of August, 1897, Mr. Gaviller made his report to the council, which was as follows: "In accordance with instructions received I have made a survey and taken the levels of part of Marl Creek, the outlet of the marsh situate on concessions 3, 4, 5, and 6, of the township of Flos. I find that sufficient fall can be obtained by deepening the bed of the creek from open water to a short distance south of the fourth line. I have also made the assessment submitted of the lots that will be benefited by the proposed drainage. The amount of the assessment, \$3,280, is intended to cover the cost of drainage and all other charges connected with the work. The marsh and proposed location of outlet and ditches are shown on the accompanying plan. As two concession lines and a side road pass through the marsh, the ditches being opened up along the road allowances will greatly assist in the construction of the road-bed. The posting out of these ditches will have to be done when the marsh is frozen over. This need not delay the work as it will be necessary to open up the outlet before the remainder of the work is proceeded with. The cost of maintenance of the work is to be divided amongst the owners benefited."

Accompanying this report were specifications, assessment, profile and plan, all of which were duly filed with the clerk of the municipality.

The specifications, amongst other things, provided: "The creek bed in the marsh, and up to the first bridge south of same, to be deepened three feet, and so as to make a channel ten feet wide at the bottom and twenty feet wide at the top. Southerly from said first bridge, and in the ravine, the creek to be deepened as shown in profile, said deepening to be ten feet wide on the bottom and twenty feet wide at the top."

The work to which this part of the specifications relates would end at a point in the creek about one mile south from the marsh.

The total cost of the work was estimated by Mr. Gaviller at \$3,280. Notice was duly given to the persons whose lands were assessed, as required by sec. 16 of the Act. Pursuant to such notice, the council met in order that the clerk might read the engineer's report to the ratepayers in attendance at such meeting, as required by sec. 17 of the Act. The report was read, and none of the persons who had signed the petition withdrew therefrom. Thereupon the council, by resolution, authorized the head of the municipality to sign the petition for the municipality, and by another resolution adopted the report; and they also provisionally passed a by-law in the form given in the statute, authorizing the execution of the work recommended by the report of the engineer, as shewn by his plans, specifications and estimates which accompanied the report. Such by-law, among other things, enacted: "The said report, plans, specifications and estimates, are hereby adopted, and the drainage work therein indicated shall be made in accordance therewith."

The by-law directed that it should be published in the manner required by the statute, and it was so published.

The court for the revision of the engineer's assessment met on the 18th September, 1897, and, after hearing evidence in relation to the appeals against such assessment, by resolution requested the engineer to meet the court at its next sitting for the purpose of giving information with respect to the exact quantity of land which would be benefited by the proposed work, and then adjourned to the 25th of the same month, and on that day it appears instructions were given to

the engineer to vary the specifications of the 5th of August so as to increase the depth of the Marl Creek outlet, and to give it a bottom width of six instead of ten feet.

These instructions appear to have been given either by the court of revision or by a committee of the council theretofore appointed by the council to supervise the execution of the proposed work; and I think on that occasion instructions were also given to vary, in other respects, the plan of drainage as adopted, for, on the 29th of the same month, the engineer handed in new specifications and a new profile in accordance with the instructions he had received, as well as a plan which showed alterations and extensions of the drainage work, as adopted by the council, and also new drains. Such extensions, etc., are shown on the plan, and are designated thereon by the word "special." No new report was made. The court of revision appears to have adjourned from the 25th of September to the 9th of October following.

On the last named day, as appears by the minutes, the work of revising the engineer's assessment was completed, and the by-law, as provisionally passed and published, save only as the assessment was amended or changed by the court of revision, was finally passed, and afterwards duly registered.

The work was, without any formal act of the council authorizing a change, executed in accordance with such new specifications, profile and plan, and it appears from a report of the engineer of the 21st of February, 1899, that such work, which was then unfinished, had cost \$5,499 instead of \$3,280, which he, by his report, upon which the council acted in provisionally passing the by-law, estimated would cover the cost of drainage and all other charges connected with the work.

The fall from the marsh area to the southern limit of the defendant township is between ninety and one hundred feet.

The evidence was that Marl Creek, between the lands of the plaintiff Priest and the Nottawasaga River, was in different places blocked with jams made up of fallen trees, driftwood, brush, logs, stumps, etc., the effect of which was to greatly impede the flow of the water.



The plaintiff Priest complaining that the defendants, by means of such drainage works, had caused the waters of the marsh and surrounding lands to be collected and discharged into the creek in increased quantities, and with increased force and velocity, and that by reason of their not providing a sufficient outlet across his lands and lands lower down the creek for such waters, they overflowed the banks of the creek and flooded his lands to his injury; and the plaintiffs, the township of Vespra, also complaining that from the same cause their roads and bridges had been damaged, the plaintiffs, on the 17th of June, 1899, joined in instituting proceedings under sec. 93 of the Drainage Act, R. S. O. 1897 ch. 226, for the recovery of the damages so claimed, and for a mandatory order or an injunction. Thereafter the plaintiffs brought this action in the High Court, by writ issued on the 22nd of August, 1899, against the defendants for substantially the same causes, and asking for the same relief.

The defendants pleaded, *inter alia*, that the works were carried out in accordance with the plans, specifications and awards of the engineer, and under the supervision of a committee appointed by the council of the defendants, who, in every respect, performed their duty in a skilful, proper, and careful manner; that they adhered to the report of the engineer, as adopted by the council; and they denied that the committee enlarged upon or went beyond such report, or that they did or caused to be done any act not clearly authorized or contained in such report; and they also denied that such works or any part thereof were negligently or improperly constructed or performed, as alleged by the plaintiffs. And with reference to the claims made under sec. 93, they say that such claims arose prior to the period of one year from the date of filing and serving of the notice of claim under that section.

On the 5th of September, 1899, on motion made in the action on behalf of the plaintiffs, it was ordered that "any claims made in this action, referable under the Municipal Drainage Act, after action, which can not be enforced in the references under sec. 93 of the Municipal Drainage Act now

pending before the Drainage Referee under said Act, if any such claims there be, be and the same are hereby referred to the said Drainage Referee, both references to proceed concurrently as the one reference."

The action came on for trial before the Referee, who found (1) that the drains constructed by the defendants were not the drains outlined and described in the engineer's report of the 5th of August, 1897; (2) that the plaintiff's lands and crops had been damaged by the water which had been brought down Marl Creek in larger quantities and greater speed, owing to the work done to the said creek by the defendants.

He held that the defendants could not claim the benefit of the by-law, and he assessed the plaintiff's damages at \$200. And he ordered that "unless the said defendants do, within one year from this date, take the necessary proceedings to relieve the said plaintiff Priest's lands and crops from damage caused by the waters of the said drain, an injunction do issue in this action restraining the said defendants from causing any such damage to the lands and crops of the said plaintiff Priest, or discharging the waters of the said Marl Creek with greater velocity and in greater quantities than came down before the construction of the said drain, but this is to be without prejudice to the plaintiffs, or either of them, taking any proceedings for the recovery of damages which either may in the meantime sustain."

The first and main question which this appeal presents is, whether the by-law in question authorized the execution by the defendants of the drainage works complained of. If it did not, then they are responsible to the plaintiffs in this action for such damages as they may have sustained, caused by the construction of such works without regard to whether they were properly or negligently made.

The evidence clearly establishes—indeed it is not denied—that the works as constructed were not those recommended by the engineer's report of the 5th of August, 1897, and authorized by the by-law in question as it was provisionally passed.

But in the argument before us it was contended for the defendants that the plan or scheme of drainage indicated by the specifications, profile, and plan, of the 29th of September, 1897, amended the former plan or scheme adopted by the council, and that therefore the work of carrying the plan out as amended should be regarded as having been done under the authority of the by-law in question. With this contention I cannot agree. There is no doubt that if a plan or scheme of drainage authorized under sec. 3 (1) of the Drainage Act is submitted to a municipal council by their engineer, which in the opinion of the council is not desirable, it is open to them to refer it back to him for amendment: *Raleigh vs. Williams*(1).

But where, as here, the council have approved their engineer's plan or scheme by adopting his report and provisionally passing a by-law which directs the execution of the works according to such plan or scheme, it would seem clear that no such power as is contended for is, by the statute, conferred on the council. Section 15 of the Drainage Act requires the engineer, as soon as he has completed his report, plans, specifications, assessments and estimates, to file the same with the clerk of the municipality by which he was employed. The clerk being a public officer, the report, plans, etc., are open to inspection by any person whose interests may be affected by the contemplated work. Then sec. 16 directs the clerk of the municipality to notify all persons, assessed within the area described in the petition, by mailing to them a circular or postal card upon which shall be stated the date of filing the report, the name of the work, its estimated cost, the owners' lands and their assessment, and the date of the council meeting at which the report will be read and considered.

The evident purpose of such notice is not only to inform an owner that his lands have been assessed for the cost of a contemplated drainage work, but to afford him such information as will enable him to promote or oppose the scheme at the council meeting to be held under sec. 17, at which the engineer's report must be read and considered.

The last mentioned section requires the council at such meeting to cause the report to be read by the clerk to all the ratepayers in attendance, and it declares that any person who has signed the petition may, in the manner therein prescribed, withdraw from it, and those who have not signed it are to be given an opportunity so to do, and if the roads of the municipality are assessed, the council may, by resolution, authorize the head or acting head of the municipality to sign the petition for the municipality, and such signature shall count as that of one person benefited in favour of the petition.

Then sec. 18 provides that, should the petition at the close of the meeting of the council contain the names of the majority of the persons shown to be benefited within the area, the council may proceed to adopt the report and pass a by-law authorizing the work, and it declares that no person having signed the petition shall be permitted to withdraw.

To hold, as contended for by the learned counsel for the defendants, would be to declare that although petitioners for a drainage work initiated under sec. 3 (1) are not, after the adoption by the council of the engineer's report, permitted to withdraw their names from the petition, the council may, nevertheless, after such adoption, of their own motion, alter or amend the plan of the work which had been assented to by the ratepayers affected, and adopted by them, so as to enlarge or vary such work, and thus give those whose lands are assessed for the cost of the work petitioned for, something they neither asked for nor assented to, and, possibly, a work involving increased cost.

The Act does not, in terms, vest any such power in the council, and, in my judgment, does not admit of the construction contended for by the defendants. After the adoption of the report, the council, of their own motion, have no more power to change the plan or scheme of the work than the petitioners have to withdraw from the petition. The scheme assented to by the ratepayers and adopted by the council is the only one which the council could, by by-law, authorize to be carried out.

In the present case, in my opinion, the by-law in question affords the defendants no justification for the works as executed. Their construction was unauthorized, and, therefore, the defendants are answerable to the plaintiffs in this action for such damages as they may have sustained by reason of their construction: See *Re Misener vs. Township of Wainfleet* (2).

The finding of the Referee that the works as constructed resulted in injury to the plaintiffs is abundantly supported by the evidence, and I think the defendants have no reason to complain of the amount awarded as damages.

That part of the formal judgment relating to the injunction should direct as follows: "An injunction restraining the defendants from discharging the waters of the said Phelpston Marsh down the said work and the said Marl Creek in the manner in which the same are now being discharged, so as to occasion damage or injury to the plaintiffs' lands and crops, and the operation of the said injunction is suspended for six months from the 8th day of January, 1901, in order to enable the defendants to take such measures in the meantime as they may be advised to prevent such damage or injury from arising hereafter."

It follows from what I have said that the appeal ought to be dismissed.

*Appeal dismissed.*

## IN THE HIGH COURT OF JUSTICE.

## SHAVER VS. THE TOWNSHIP OF WINCHESTER.

*Non-completion of Drain—Damages—Mandamus.*

The defendant township having undertaken the construction of a drain, for which plaintiff was assessed, and failed to complete it, was held responsible for damages, and a mandamus was ordered requiring the township to provide drainage for the plaintiff's land.

The action, commenced by writ, was referred to the Drainage Referee by order of the local Judge at Cornwall on the 28th of August, 1900.

The Referee, after inspecting the locality on the 20th of September, 1900, made the following report on inspection:—

I inspected the locality in question and also the drainage work known as Kettle Creek Drainage Work and Robinson Award Drain, and Black Creek Drainage Work, in company with George C. Hart, Esq., solicitor for the plaintiff, and M. R. Hamilton, one of the councillors of the defendants, on Wednesday, the 19th day of September, 1900, and from such inspection it appeared that by the upper section of the Kettle Creek drain it was sought to carry water out of its natural course over a watershed with rock near the surface. The rock had not been taken out to the depth of the grade fixed by the engineer, and the drain was never completed in other respects. The drainage work through the eighth concession is badly out of repair, and there is evidence on the ground that instead of the water going away from the plaintiff's land, more was brought upon it than nature caused, and hence the crop was damaged. The defendants have assisted the plaintiff in trying to get an outlet in a more natural way through the Robinson Award Drain to Black Creek Drainage Work. This is the proper direction for the plaintiff's land to drain.

The trial proceeded on the 20th of September, 1900, at Chesterville and the following judgment was given:—

J. B. Rankin, Q.C., Referee:—

Upon the reference to me of the issues herein by order of the local Judge at Cornwall, dated the 28th day of August, 1900, I find and report thereon as follows: The plaintiff owns the south-east quarter of lot number 16 and the south-west quarter of lot number 17 in the 9th concession of the township of Winchester. The Kettle Creek drain heads across the road from the plaintiff's lands and they were assessed for its construction. I find and report that such drain is badly out of repair, and that it was never completed according to the plans, specifications and profile; that the plaintiff has suffered damage to his land and crop by reason of the non-completion and non-repair. I further find and report that the defendants have assisted the plaintiff in obtaining drainage for his land by paying \$25 towards draining plaintiff's land to the Black Creek Drainage Work. I further find and report that the plaintiff's damages amount to the sum of \$75. The plaintiff is further entitled to a mandatory order against the defendants to provide drainage for the lands assessed on or before the 1st day of March, 1901. Plaintiff is entitled to his costs of action.

## IN THE HIGH COURT OF JUSTICE.

NICHOLAS HANSON ET AL. VS. THE TOWNSHIP OF MATILDA.

*Non-completion of Drain—Damages—Mandamus.*

Defendants held responsible for damages caused by the non-completion of a drain and non-repair of the portions completed, and mandamus ordered directing the defendants to complete and repair the drain.

This action, commenced by writ, on the 1st May, 1900, was referred to the Drainage Referee by order of the local Master at Cornwall.

The plaintiffs claimed damages to their land and crops alleged to be caused by the non-completion and negligent construction of a drainage work and by non-repair.

The work was undertaken by the defendants under the provisions of the Municipal Drainage Act, and the by-law authorizing it was finally passed in 1895, intituled "The Toye Creek Drainage By-law," under which the plaintiffs were assessed for benefit. The drain was put under contract and partially constructed in 1895 and 1896.

The defendants sought to excuse the delay in completing the drain by setting up the default of the contractors and the wet seasons prevailing since the work commenced.

The Referee having made an inspection on the 17th of September, 1900, reported thereon as follows:—

I inspected the locality in question and also the drainage work known as the Toye Creek Drainage Work in company with the solicitors for the plaintiffs and defendants, C. A. Myers, Esq., solicitor for plaintiffs, and John Harkness, Esq., solicitor for defendants, and found that the upper sections and lower sections of the work had been done, but the section through the greater part of plaintiffs' lands had never been completed nor nearly completed, and the portions originally completed are now out of repair, and there is evidence on the



ground of the water having been brought down the only incline of the land in the course of the work; and where the flat land begins is on the side of the plaintiffs' land upstream and the water was left to spread over and injure the land and crops.

The trial proceeded at Morrisburg on the 17th and 18th of September, 1900.

C. A. Myers, appeared for the plaintiffs.

John Harkness, appeared for the defendants.

Judgment was given on the 26th September, 1900, by

J. B. Rankin, Q.C., Drainage Referee:—

Upon the reference of the within issues to me by order of the local Master in Chambers at Cornwall, I find and report thereon as follows: I dismiss without costs the claim of Alice Barclay. The other two plaintiffs, Nicholas and Almira Hanson, are entitled to damages for the years 1896, 1897, and 1898, owing to their lands and crops being injuriously affected during the construction of the Toye Creek drainage work, the non-completion of such work, and the non-repair of same. And I report the damages sustained as aforesaid at the sum of \$120. The plaintiffs, Nicholas and Almira Hanson, are entitled to a mandatory order to compel the defendants to complete and put in proper repair the above drainage work on or before the 1st of March, 1901.

## IN THE HIGH COURT OF JUSTICE.

GEORGE W. RAYFIELD VS. THE TOWNSHIP OF AMARANTH.

*Repair—Improvement—Mandamus.*

Where a drain is not out of repair the Drainage Referee has no authority to order a mandamus to compel the improvement of the drain under the provisions of sec. 75 of the Municipal Drainage Act.

Secs. 73, 74, and 75 considered.

Peltier vs. Dover East, Clarke & Scully's Drainage Cases, vol. 1, p. 323, referred to.

September 18th, 1901. J. B. Rankin, K.C., Drainage Referee.

This is an action brought by the plaintiff as owner of the west half of lot 19 and the north half of the west half of lot 18, in the 7th concession of the township of Amaranth, and also as tenant of the south half of the west half of lot 18 in the same concession, against the defendants for damages for non-repair of certain drains constructed in 1888, under by-law 209, and known as drains numbered 20, 21, and 22, and for not keeping said drains maintained to a depth or width equal to that required by the by-law under which the same were constructed, nor banked as required by the said by-law, and the drains have been allowed to become foul with earth, driftwood and vegetation and other obstructions, and a mandamus is also asked for. The action was entered for trial at the Spring Assizes (1901) for the county of Dufferin, and by order of the Chancellor, indorsed on the record, was transferred to me for trial, subject to appeal.

Matthew Wilson, K.C., and J. N. Fish, Esq., for plaintiff.

J. P. Mabee, K.C., and A. A. Hughson, Esq., for defendants.

The trial took place at Orangeville, in the county of Dufferin.

Pursuant to my appointment, the locality was inspected by me, in company with representatives of the parties, on the 19th day of April, 1901. The trial and hearing of arguments of counsel lasted four days, namely, April 20th, June 3rd, 4th and 5th.

At the close of the argument, while intimating my decision, I reserved it, and now, having considered the whole matter and carefully perused my notes of evidence and argument, together with the exhibits filed (one of which was missing), I make my report, giving my reasons therefor.

The drainage work in question was constructed by the defendants in the year 1888, under By-law No. 209 (exhibit I.). What is called drain No. 20, passed through the plaintiff's land, and is the only part of the work under said by-law affecting his lands. The plaintiff's lands, one hundred and fifty acres, as in the statement mentioned, were assessed the sum of \$200 for the improvement of them. These lands, as well as others, through which No. 20 extended, were at the time of the construction of the work in a state of nature, covered with small tamarack trees. The evidence shews it to have been at that time a tamarack swamp. The soil was a black and boggy vegetable mould, which varied in depth from two to five feet.

From the field plan and profile it appears that No. 20 was about four and a half miles long. Its course was staked off and numbered from 0 to 245, and the stakes were 100 feet apart. The profile shews a height of land or watershed at stake 199, and from this point to stake 245, the water in the drainage work would flow westerly, and discharge into the head of the drainage work No. 21, constructed under the same by-law. From stake 199 to stake 0, the water in the work would go east and then south, and discharge into a creek on the easterly half of lot 15, in the 7th concession of Amaranth. The drainage work known as No. 20 had a double outlet, only one of which affects this case.

The lands through which that portion of No. 20, from stake 199 to stake 0, extends trend east and south, and taking the face on the surface at intervals often staked, the result will be as follows:—

|   | Ft.  |    | Ft. |    | Ft.  |    | Ft.  |
|---|------|----|-----|----|------|----|------|
| 1 | 1.15 | 6  | .31 | 11 | .69  | 16 | 4.60 |
| 2 | 1.14 | 7  | .31 | 12 | .69  | 17 | 3.40 |
| 3 | 1.14 | 8  | .35 | 13 | .69  | 18 | 3.40 |
| 4 | 1.82 | 9  | .69 | 14 | .69  | 19 | 2.92 |
| 5 | 1.85 | 10 | .69 | 15 | 1.77 | 20 | .90  |

The fall in the bottom of the drainage work, when constructed, is as follows:—

Stake 199 to 153, 6.59 feet; stake 153 to 120, 1.00 feet; stake 120 to 97, 1.61 feet; stake 97 to 70, 1.86 feet; stake 70 to 50, 2.19 feet; stake 50 to 40, 3.4 feet; stake 40 to 0, 10.96 feet.

The plaintiff's lands—two hundred acres, one hundred and fifty of which he owns, and the remaining fifty he leased from one Newstead—lie between stakes 97 and 70, as nearly as possible.

In the year 1890 the council of the defendants passed a by-law, No. 233, making it unlawful to obstruct drains by trees, brushwood, timber, stones or any other material liable to impede the free flow of water, and providing for culverts and fences being constructed or built over drains in such a way as to afford the most ample room for the free flow of the water and for keeping the drains cleared out to their original depth, and making provision for the inspector of drains doing the work of defaulters, and providing the method of collecting the cost and expenses.

In 1893 another by-law was passed, appointing an inspector and defining his duties. The by-law, among other things, provides: "It shall be the duty of the said inspector, upon complaint against any portion of a drain to examine the said drain and direct what repairs are needed, and by whom to be performed, and in the event of the said parties not completing the same within the time specified in the award, it shall be the duty of the inspector to let the same after one week's notice by public sale, and the costs of the said work and expenses connected with the letting thereof, shall be charged against the person or persons in default," and by the same by-law, W. B. Jelly was appointed inspector, until removed by the council.

The drainage work in question was duly completed in 1889 according to plans, specifications and profile, and accepted by Chas. R. Wheelock, P.L.S., the engineer in charge, and the then reeve of Amaranth, who appears to have been associated with the engineer as commissioner. The profile

and specifications provide for the chopping and clearing of a width of 25 feet in the course of the work, and inside this 25 feet in the more immediate course of the drain, it was provided that a strip 10 feet wide should be grubbed and cleared, and within this 10 feet the excavation was to be made according to the depths and widths given, and the excavated earth was to be deposited two feet away from the sides, in other words, there was to be a berm on each side two feet wide.

The drainage work was kept in repair under the provisions of said by-laws of 1890, and 1893, and the plaintiff was well aware of the existence and provisions of such by-laws, and made use of them in having the drain cleared from obstructions, etc. In June he had some difficulties with the owner immediately above him and across the 7th and 8th concession road, named Kennedy, and he gave a notice to the council to take steps immediately to have the drain through lot 17 in the 7th concession, and lot 19 in the 8th concession, and across the concession attended to. Lot 19 in the 8th concession was owned by said Kennedy. The inspector notified the parties complained against and the plaintiff. Thinking that the inspector gave Kennedy too long to do the work of removing obstructions from the drain on the lot above his land so as to let the water down, he went to the council meeting about the 8th of July, and wanted the time shortened as regards Kennedy. His request was not granted, but Kennedy attended to the inspector's notice, and did the work through his lands. The work through lot 17 was afterwards done by contractors, to whom the work was let by the inspector. There was no mention of damages to the council at the meeting except what was contained in the notice.

Thomas H. Keys was the inspector in 1899.

In the month of July, 1899, the plaintiff had a honey transaction with Eli Driver, who lives on the east half of lot 13 in the 8th concession of Amaranth, and in the conversation the plaintiff told Driver that he was going to have proceedings taken against the township for the years 1896, 1897, and 1898, and he was going to prove that the crop on the land for 1899 at the time of speaking, was good and so much better

than any of the other three prior years. Driver walked up the drain and saw the condition it was in. He gave his evidence apparently without favor to either side, and I was impressed with its truthfulness. He has no interest in this action. The plaintiff swears that no such conversation took place.

The plaintiff says in his cross-examination that he abandons damages for the years 1896, 1897, and 1898, particulars of which he had given in the direct examination, and he would confine himself to the damages for 1899. He puts in a claim for \$800 or \$900 damages, in the year that he told Driver that he had a good crop, better than any of the previous years, 1896, 1897, 1898, and he was going to take proceedings for these years and show what a good crop he had in 1899.

At the council meeting on the 8th July, 1899, John Crombie states that the plaintiff gave as his reason for wanting the council to shorten the time, namely three weeks, given by the inspector to Kennedy to do the work in the drain through his, Kennedy's land, that he, the plaintiff, did not want Kennedy to keep the water in the drain up there for Kennedy's cattle to drink. The plaintiff admits this conversation. He says that he stated to the council, that the drain through Kennedy's was holding the water back for his cattle.

The plaintiff had intentionally set out fire prior to the year 1896, and on several occasions since, and had burned away the banks and sides of the drain eighteen inches deep (he admits), while other witnesses say two feet, and some three feet down to the bottom of the drain, and evidence is given further, that he scraped away the sides and banks where they were not burned, in order to fill up the burned holes in the field. He admitted to one witness that one burn was worth \$500 to him. It may have been a benefit to the land in burning the mould off, but it meant ruin to the drain. He speaks of it approvingly, and calls it a good irrigation system.

In 1898 some of these minor repairs were made in the drain, and the plaintiff deepened the drain through his farm

some five or six inches below the original bottom; and to Mr. Bremner he stated that he was renting Newstead's farm of fifty acres below and adjoining, so that he could continue the deepening and improvement through Newstead's land. This would have to some extent at least remedied the burning and scraping away of the sides and banks of his own land, but it was never carried out until the council did it in 1900, and the plaintiff was paid \$56 for the work he did in the drain, on his and Newstead's farm.

The evidence of the engineers, Wheelock and Davis, satisfies me that the capacity of the drain in 1899 was greater than when first constructed, and that with the improvement of 1900, its capacity for carrying through and from the plaintiff's land is almost doubled, were the sides and banks not burned off and scraped away by the plaintiff himself.

A motion was made to amend the statement of claim so as to bring in the construction of a lateral from the 7th and 8th concession road on the south side of his land, and as I was of the opinion that the whole cause of complaint should be investigated, I stated that I would allow the motion on terms, and in the meantime admit the evidence on this branch of the case. The drain is a small one and upon the plaintiff's lands, and he assisted in preparing a way for the drain, and acquiesced in the construction of it, and used it after its construction, and is estopped by his acts from making it a cause of complaint. Were this not so I would find upon the evidence given in relation to it, that no damage could arise from its construction for which the defendants could be made liable.

In the year 1898 and before the plaintiff arranged for the leasing of the Newstead farm, Newstead, the owner, had, as the plaintiff puts it, cleared out the drain, by mowing and burning it, and dug it out at the lower end four or five inches, and the plaintiff admits having done more work in the drain on Newstead's farm, in the spring and fall of the year 1899. This was the object he had assigned for renting such a farm, at a rental of \$50 and taxes.

It is admitted by the plaintiff that if the drain had been in the same condition as when first constructed, he does not

know what the result would have been in 1899; but he thinks that the defendants should keep the drain large enough to take all the water off, and drain the lands, and the drain should be made larger by deepening and widening still further, and at the same time he states that the drain is all right now down below him, and will relieve him.

The onus is on the plaintiff to prove that the defendants have a statutory duty cast upon them, and that by negligence, or some other way, that duty has not been performed, and as a consequence he has suffered damage. He has wholly failed in proving that he is entitled to damages, either for negligence on the part of the defendants, or by way of compensation for injury sustained.

I intimated during the argument of counsel that the case could not be distinguished from *Peltier vs. Dover East*, (1) and I am still of the same opinion.

As to the mandatory order, if issued under section 73, based upon the notice of the 17th January, 1900, it could have no effect, as the drain was not then in a state of disrepair, within the meaning of that section. The further improvement of the drain can only be done under the provisions of section 75, and it is beyond my power to order such improvement to be done. There is a dictum of my predecessor in *Peltier vs. Dover East*, which would appear to support the plaintiff's contention, where the learned Referee says: "And as the evidence shows that it has not sufficient capacity for that purpose, I hold that it is the duty of the municipality to repair, deepen or widen it to the outlet, either under section 74, or if the cost should exceed \$400, under section 75 of the Act," but he immediately adds: "A mandamus may, therefore, issue to compel the municipality to maintain the said drainage work pursuant to section 73 of the Drainage Act."

For the reasons given, I am of the opinion, and I so find that the plaintiff is not entitled to damages against the defendants upon his statement of claim, nor to damages by way

(1) Reported in *Clarke v. Scully*, p. 323.



of compensation for injury sustained, under the Municipal Drainage Act, nor is he entitled to a mandamus as asked.

As there is no reason to question the good faith of the defendants in having complaints promptly attended to by the inspector, under the by-laws, I should be pleased, if consistent with the ordinary rule, I could relieve the plaintiff of costs, but the general rule is, that costs should be given against the party failing, and that rule must govern here.

I report, order and direct that the costs of the township of Amaranth of this action and reference be paid by the plaintiff, and that such costs be taxed by the clerk of the County Court, of the county of Dufferin, at the town of Orangeville, in said county.

I further order and direct that the trial be considered as a trial of four days, and that stamps to the amount of \$16 be affixed to this, my report, and paid by the plaintiff, and if affixed by the township of Amaranth, the amount shall be included in the costs to be taxed to the defendants.

Affirmed by the Court of Appeal January, 1903.

### REPORT OF INSPECTION.

Pursuant to appointment I was accompanied by Matthew Wilson, K.C., on behalf of the plaintiff, and by W. M. Davis, O.L.S., on behalf of the defendants, in making my inspection of the plaintiff's land and adjoining locality of the drainage work in question on the 18th day of April, A.D. 1901.

Started on the centre line of lot 17 in the 7th concession from the road between the 7th and 8th concessions and inspected the drain on the south side of the line fence. It is a small drain at the road, and increases in size as it goes east to No. 20. At the junction there is no sign of overflow. Went up No. 20 through plaintiff's land, the sides of the drain are burned off and scraped down, and attempts have been made to repair the banks in a few places. There is evidence on the ground of the water leaving No. 20 and going out over the land on both sides. In rear of the barn there are practically no sides for a distance of about thirty

yards. Water is lying in the fields in patches, and there is no movement of it in any direction. Around the bend and up to the road the water can escape from the sides, particularly the north side, and flows over the land and fills the low patches in the field. Drove up the nearest sideroad, said to be between 20 and 21 on the 8th concession, to where the drain crosses the road. On each side the fire has burned deep holes on each side of the drain, but the drain there is in good condition, excepting for the small tamaracks falling across it.

The snow had all gone, and the day was very wet.

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In the matter of the Municipal Drainage Act and of the report, plans and assessments of Thomas H. Dunn, Esq., O.L.S., for the maintenance of Barkley Drainage Work in the township of Matilda.

**TOWNSHIP OF EDWARDSBURG VS. TOWNSHIP OF MATILDA.**

*Repair—Change in Proportion of Assessment.*

The circumstances existing at the time of the original construction of the drain in question having changed, the assessment upon the appellant township was reduced to a less proportion of the cost than it paid for original construction.

November 21, 1901. J. B. Rankin, K.C., Referee:—

The inspection of the drainage work and also of the locality assessed in the townships of Edwardsburg and Matilda was made on Wednesday, the 23rd day of October, A.D. 1901, in company with the solicitors for the parties and one engineer on each side.

The trial took place at the village of Cardinal on Thursday, the 24th day of October, A.D. 1901.

T. J. French, K.C. (Prescott), for appellants.

J. G. Harkness (Cornwall), for respondents.

In the year 1890 Gideon Barkley and five other owners of land in the township of Matilda duly and regularly petitioned the council of the municipality for the drainage of

the south halves of lots 25, 36 and 37, and West Commons in the second concession or third range, and the rear halves of lots 36, 37 and West Commons in the first concession or second range of the township of Matilda.

In pursuance of such petition the council of Matilda duly appointed William G. McGeorge, Esq., O.L.S., Chatham, to make an examination of the lands described in the petition, and to report thereon. The report of the engineer is dated the 3rd day of February, A.D. 1891. In it he recommends the construction of the drainage work prayed for in the petition, commencing at the town line between the townships of Edwardsburg and Matilda, and of a short tap drain along the upper or Edwardsburg side of the said town line, so that the water caused to flow by the landowners of the township of Edwardsburg might be intercepted and conducted into the main drain heading on the town line. The report was adopted and regularly served on the council of Edwardsburg. There was no appeal from the assessment placed upon the lands in the upper township. Both townships passed by-laws and raised their respective proportions of the cost of the drainage work, and, so far as appears, the work was done and the drainage work was completed.

I find and report that this drainage work was constructed at the request and on the petition of the landowners in Matilda, and to reclaim lands which are described in the petition as "worthless for want of drainage." The assessment for construction placed upon lands in the township of Edwardsburg was merely incidental to the work asked for by the ratepayers in Matilda, and wholly necessary for the drainage of the lands mentioned in the petition. (See *Chatham vs. Dover*). (1). The work was entirely for the advantage of Matilda lands, yet drainage facilities were afforded to certain lands in Edwardsburg adjoining the townline, and an improved outlet was provided for the waters caused to flow from lands in the upper township.

After the drainage work had been in operation for eight or nine years the council of Matilda, by resolution of August

16th, 1899, instructed Thomas H. Dunn, Esq., O.L.S., to report upon the maintenance of the said Barkley drainage work. His report is dated the 19th day of April, 1900. According to his report the work of repairs is estimated to cost the sum of \$1,011.89, and, of this amount, the lands and roads of Edwardsburg are assessed \$401.33. The council of Edwardsburg considered the lands and roads in that municipality assessed too high, and hence an appeal was made against the assessment of the engineer.

I find and report that upon the evidence adduced and exhibits filed the assessment for the sum of \$401.33 upon the lands and roads in the township of Edwardsburg cannot be sustained. The drainage work was in the municipality of Matilda, with a short cut-off drain on the upper side of the town line. No part of the work nor of the proposed repair is within the limits of the upper township. A small culvert across the town line in the line of the Brown drain is, by the report, to be closed, and the water, which formerly presented itself for carriage through the Brown drain, will in future be carried down to the head of the Barkley drainage work on the north side of the town line. The Brown drain will thus be entirely left for the use and benefit of lands in the township of Matilda.

I further find and report that by the report of William G. McGeorge, Esq., O.L.S., for the construction of this drainage work, the lands and roads in the respective municipalities were assessed in the proportion or ratio of \$3 on Matilda to \$1 on Edwardsburg approximately. Applying the same ratio to the cost of repairs the assessment on Edwardsburg would be reduced to \$337.30. The repairs are still more than the construction for the advantage of the lands and roads in Matilda, and in consequence the above sum should be further reduced. There is one lot purporting to be assessed in the Township of Edwardsburg which has no existence on the grounds, but this and other minor matters relating to individual assessments can be rectified by the Court of Revision, or, in appeal, by the County Judge.

For the reasons given I find and report that the assessment upon the lands and roads in the appealing municipality is excessive, and should be reduced to the sum of \$225. The sum of \$176.33, by which the assessment of the appellants is reduced, will be added, pro rata, upon the lands and roads in the township of Matilda as assessed in the report for repairs.

At the trial counsel for the respondents admitted that the provision in the report as to the proportions in which the municipalities should contribute for future maintenance could not be supported.

The clause and schedules providing for the future maintenance of the drainage work should, therefore, be struck out of the report.

I order and direct that the costs of the appellants be paid by the respondents, and that such costs shall be taxed by the clerk of the County Court at Cornwall.

I further order and direct that the trial shall be considered as a trial of one day, and that the sum of four dollars in stamps shall be affixed to this, my report, to be paid for by the respondents, and, if affixed by the appellants, to be taxed against the respondents.

In the matter of the report, plans, etc., of John Rogers, O.L.S., dated 25th July, 1900, relating to the construction of the Stewart Drain, made to the council of the township of Elma.

TOWNSHIP OF WALLACE VS. TOWNSHIP OF ELMA, ET. AL.

*Assessment—"Injuring Liability"—"Outlet Liability"—Power to Amend.*

The Drainage Referee may amend the report of the engineer with the latter's consent by changing the assessment from "injuring" to "outlet" liability.

In order to justify an assessment for "injuring liability" the area claimed to be damaged by water from the lands assessed must be defined or definable.

The assessment of the cost of the drainage work, less the benefit assessment, at a uniform price per acre upon all the lands (high and low) contributing water, is improper.

The Drainage Act does not contemplate the assessment of a very much larger watershed in order to benefit lands in a small area or watershed.

The appeal was heard at Listowel.

J. P. Mabee, K.C., for the appellants.

H. B. Morphy, Esq., for the respondents, the township of Elma.

The other respondents, who were served by the appellants with the notice of appeal, were not represented by counsel.

January 14th, 1902. J. B. Rankin, K.C., Drainage Referee:—

On the 5th day of November, 1901, pursuant to my appointment herein, I inspected the locality of the proposed Stewart Drainage Work in the township of Elma, and also the areas assessed in Elma, Listowel and Wallace along the north branch of the Maitland River. On such inspection I was accompanied by counsel for appellants and W. M. Davis, Esq., O.L.S., their engineer, and also by counsel for respondents and John Roger, Esq., O.L.S., their engineer.

On the 6th and 7th days of November the hearing took place pursuant to my appointment, and the issue was narrowed down to the trial of the legality of the proposed drainage work as reported upon by the engineer of the township of Elma, the question as to the amount of assessment upon the appellants being left over until after the determination of the legality of the scheme.

The assessed area comprises parts of the following municipalities along the north branch of the River Maitland, beginning at the junction of the north and south branches of the river, in the township of Grey, and proceeding up stream. The township of Grey, in the county of Huron; the municipalities of Elma, Listowel and Wallace in the county of Perth, and the township of Maryborough, in the county of Wellington.

The north branch begins in the township of Maryborough, and flows westerly across the town line into the township of Wallace; gradually turning south it passes from Wallace through the town of Listowel, and continues south into Elma, and proceeds south-westerly until the town line of Grey is reached, where a loop is formed in Grey, and thence back into Elma, where a much larger and longer loop is formed, and the town line is again crossed into Grey. Thence it flows westerly into the head of the main river. In other words, the north branch is in the shape of a huge letter S., with Maryborough at the extreme upper end, then Wallace, then Listowel (the town being formed of parts of Wallace and Elma), in the centre, then Elma, and finally Grey. The area comprised within the watershed of the north branch, excluding the lands in Grey, contains 30,934 acres.

In the township of Elma there are two lateral, and minor watercourses, extending easterly from and connecting with the north branch. The northerly is known as Spring Creek, and joins the north branch at about one third the distance around the lower loop already mentioned, in the township of Elma; and the southerly is now called the Hanna Drainage Work, and joins the north branch about two-thirds of the dis-

tance around the loop. These are both within the watershed of the north branch.

According to the report of the engineer, the watershed area of Spring Creek comprises about 8,060 acres, and that of the Hanna drainage work, and the lands between these two watersheds aggregate 11,390 acres.

So much has been said concerning the general outline, trend and extent of the municipal areas, which are to become the revenue producing sections, for financing the proposed drainage work, attention will now be directed to the initiating power, exact location and scope of the proposed drainage work.

Generally speaking, the area to be drained is contained within the Spring Creek watershed. The petition asks for the draining of lots 25 and 22 inclusive, in the 5th concession; 23 to 11 inclusive, in the 4th concession, and lots 17, 16, west half of 12, 11, 10, and 9, in the 3rd concession of the township of Elma. There are 22 signatures to the petition, and no evidence was given with a view to attacking its validity.

The council of Elma passed by-law No. 402, authorizing John Roger, Esq., O.L.S., as its engineer, to make an examination of the territory to be drained, and to prepare plans and profiles, and to make assessments, and estimates, and report thereon.

The engineer's report is dated the 25th day of July, 1900. It was duly filed in the office of the clerk of the township of Elma. Notices were given by the clerk, as provided by statute, and the report was read in the presence of those who attended, in pursuance of the notice, and no names were withdrawn from, or added to the petition. The report was then adopted, and copies of it were regularly served upon all the municipalities affected. In so far as necessary to understand this case, the only parts of the report requiring consideration are clauses 1, 2, and 6, the work recommended, the total cost of the work, and its distribution.

Clause 1. "I find that a great portion of the land, within the area described, is badly in need of a drain to carry off the



water, and to provide a means for underdraining the said land."

Clause 2. "That the north branch of the Maitland River, from lot No. 2, in the 5th concession of the township of Elma, to lot No. 27, in the 7th concession of the township of Grey, is in places very crooked, and narrow and sluggish; and has become so much stopped up with logs, weeds, sand-bars, etc., that some of the adjacent lands are periodically flooded by the large quantity of water delivered to the river by the extensive system of drains that have been constructed in its watershed area during the last few years."

Clause 6. "That owing to the vast territories above mentioned, which have been, and are being systematically drained, the cultivation of the following lands down stream from said areas, being lots numbered 1, 2, 3, and 4, in the 6th concession; lot No. 4 in the 7th concession, in the township of Elma, and other lands, is seriously interfered with."

Then follows a recommendation that the Stewart drainage work be constructed from lot 25 in the 5th concession of the township of Elma to lot 2 in the 5th concession of the same township where it joins the north branch of the Maitland River. Then, that the north branch from the outlet of the Stewart drainage work, to lot No. 27 in the 7th concession of the township of Grey, be improved in places by strengthening, deepening, clearing of obstructions and widening, in order to make the flow as uniform as possible, in proportion to the volume of water delivered to its channel. Bridges, damages, disposal of material, allowance for excavations and maintenance are all provided for.

#### ESTIMATES:—

|                               |             |
|-------------------------------|-------------|
| On Stewart Drainage Work .... | \$11,203 20 |
| On River Improvement .....    | 7,054 10    |
| Survey, plans, etc. ....      | 1,014 00    |
| Superintending .....          | 450 00      |
| Publishing, etc., etc.....    | 1,296 12    |

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Total .....\$21,017 42

## ASSESSMENT :—

|                                   |             |
|-----------------------------------|-------------|
| Roads and lands in Elma .....     | \$16,764 04 |
| Roads and lands in Grey .....     | 266 88      |
| Roads and lands in Listowel ..... | 462 44      |
| Roads and lands in Wallace .....  | 2,717 92    |
| Roads and lands in Maryborough.   | 806 14      |

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Total ..... \$21,017 42

The township of Wallace appealed from the report of the engineer and the assessment of lands and roads within its jurisdiction on the following grounds:

That the scheme of the drainage work, as it affects the township of Wallace, should be abandoned or modified as being unnecessary, so far as the appellants are concerned, and is not a benefit; that if such drainage work is to be effectual it should provide for a better outlet by improving the north branch of the Maitland River, flowing south-west of Listowel; that it does not provide for a sufficient outlet; that the proportion assessed against Wallace is unjust, unequal and excessive; that the petition, and the preliminary proceedings were insufficient to warrant the action taken by the township of Elma, and to warrant the said report; and that the report and assessment are otherwise illegal and void.

The objections and defence of the respondents, the township of Elma, simply justified the report and assessments, and claim that the appeal from the report and assessments should be dismissed.

The lands embraced in the petition have already been mentioned, and are 800 acres in the 5th concession, 2,600 acres in the 4th concession, and 1,100 acres in the 3rd concession of Elma. From the last, or lowest, lot petitioning to where the Stewart drainage work reaches the north branch of the Maitland River, there are nine lots intervening, and the proposed work passes through these lots, and connects with the north branch about one lot east of the town line between Elma and Grey, or about the boundary between lots 1 and 2 in the 5th concession of Elma.

The north branch, above where the proposed Stewart drainage work will join it, is blocked up with fallen timber, flood-wood, wood, and jams in the township of Elma, and across the town line, in the township of Grey. Below the junction a similar condition exists, and in addition, a high gravel ridge of land, which forces the water around it a distance of over two miles, while the distance across the neck of this ridge, or spur, is less than half a mile. The course of the proposed work is around the ridge, and thence to the forks, where the north and south branches of the River Maitland unite.

No artificial improvements have been made in any part of the north branch, and so far as shown, no such improvements have been made in Spring Creek, in the channel of which the Stewart drainage work is proposed to be constructed.

There is no provision in the report to improve the north branch of the river, above where the proposed Stewart drain enters. The river improvement begins at the south-westerly corner of lot 2 in the 5th concession, and extends down stream to the outlet of the north branch in the Maitland River; and it is for its proportion of the cost of this river work that the lands and roads in the appellant township are assessed \$2,717.92.

The fall in the course of the north branch, from the town line, between Maryborough and Wallace, to the town line between Wallace and Elma, is 45.33-100 feet in a distance of about six and a half miles. There are in places flats on each side of the stream, varying in width from 10 to 20 rods. The outside banks vary in height, from 40 to 60 feet. The river is obstructed in Wallace with willows, grasses, brush-wood, logs, rails, driftwood and jams, and its course is very crooked and sinuous. In the town of Listowel there are in the stream, abutments and piles, supporting bridges and buildings, and three dams across the river, one of which is solid from end to end. In the township of Elma the stream, though very crooked, is fairly clear down to the town line between Elma and Grey, a distance of nearly six miles, and a short distance farther the banks disappear, and the bed and

flats are strewn with fallen trees, timbers, flood-wood and jams for nearly a mile, to the point of entrance of the proposed Stewart drainage work. From the south boundary of Wallace, following the course of the stream to the junction of the proposed Stewart drainage work, the distance is about nine miles, and the fall is 79 feet. The nearest part of the proposed work, of which any advantage can be taken by the appellants, is nine miles from the southerly boundary of Wallace.

I have stated my finding of fact at considerable length for the purpose of a clear and full understanding of the existing condition of the north branch and the Spring Creek, and, at the same time, the area to be benefited, and the exact location of the proposed work.

Under such circumstances the question of law arises: can the lands and roads in the appellant township be assessed, either for outlet liability or injuring liability, as defined in the statute? There is no assessment for benefit, and there is no claim that any benefit could possibly be derived. The assessment placed upon the appellants' lands is not for "outlet liability," and it would be quite competent for me, with the consent of the engineer, to amend his report by charging against the appellants "outlet liability" assessment, erroneously charged against them by the engineer for "injuring liability."

In re Township of Rochester and Township of Mersea (1).

A judicial construction has been put upon sub-section 3 of section 3 of R. S. O. ch. 226, in the case of Orford vs. Howard (2). The facts in that case were wholly different from the case now under consideration. If this were a drainage scheme to improve the north branch, within the limits of Elma, then the case cited would apply. It cannot apply to a small lateral scheme benefiting 4,500 acres, or parts thereof, and extending from the area benefited through nine township lots to the natural branch of a river, and then, by reason of the branch being improved from the junction to its

(1) 26 O. A. R. p. 474.

(2) 27 O. A. R. p. 223.

outlet, demanding assistance, by way of "injuring liability" assessment, from lands and roads between 9 and 15 miles up stream.

I further find, that the area claimed to be damaged by water from the lands of the appellants, is neither defined nor definable. See section 6 of the engineer's report, and this is the only foundation upon which an assessment for "injuring liability" can be properly and legally based.

In re Township of Orford and Howard, et. al (3).

Nor can I accept the principle upon which the lands on the north branch were assessed by the engineer. He states in his evidence that he estimated the cost of the river improvement at \$10,054, and, deducting the benefit assessment of \$1,046, and \$1,612, below the Elma and Grey town line, would leave \$7,396 to be provided for; and he divided this balance by 30,934, the number of acres within the north branch watershed, excluding lands in Grey, and the result obtained was 24 cents per acre, and this sum is placed upon every acre, whether high or low land.

In re Township of Caradoc and Ekfrid (4), Mr. Justice Osler says: "Section 3 requires him (the engineer) to make an assessment of the lands and roads to be benefited, and of any other lands liable to be assessed as thereafter provided, stating, as nearly as may be in his opinion, the proportion of the cost of the work to be paid by every road and lot, or portion of lot (a) for benefit, (b) and for outlet liability, and (c) relief from injuring liability as afterwards defined: section 3, sub-section 1, latter part. This is also, again, by section 12, expressly required to be done by the engineer in his report. I need not further refer to the assessment for benefit. Assessment for relief for injuring liability seems to be the same thing as assessment for what is defined, or rather described, as 'injuring liability' in sub-section 3 of section 3, viz., the assessment of lands from which water is 'by any means caused to flow upon and injure' other lands: the assessment being for the cost of the drainage work necessary for relieving the injured lands from such water."

"The engineer has not assessed any lands under this head of liability. A perusal of the evidence satisfies me that the Referee was right in holding that the report was not open to substantial objection on this ground."

I am, therefore, of the opinion that the lands and roads of the appellants could not legally be assessed for "injuring liability."

I am also of the opinion that such lands and roads could not legally be assessed for "outlet liability."

At page 581 of the last case cited, Mr. Justice Osler says: "It is plain from the evidence of the engineer that, so far as they are concerned, the work does not give them an improved outlet. I speak now of the large bulk of the property assessed, for there may be cases of a few lots along the course of the drain, the outlet of which is improved, or which are distinctly benefited by the new work. What I regard as objectionable in the principle which the engineer seems to have adopted, is this, that, to use his own language, he has taxed the lands because they contribute water to the area drained, charging lands within that area with outlet expenses, no matter how remote they are, and although the new work, or perhaps the drain itself, is not necessary for the cultivation or drainage of the land."

If it be legal that the majority of owners within a described area, as here, in three concessions, embracing at most 4,500 acres of land, can initiate a drainage work which will put under cultivation 30,934 acres, then I cannot understand why the majority of owners, of 400 acres in one of the concessions, could not do the same work and have the 30,934 acres assessed as they are in this case.

In re Montgomery and Raleigh (5).

The Chancellor in *West Nissouri vs. North Dorchester* (6), says: "The intent of the statute, it appears to me, is, that if the drain projected in one township is carried into a neighbouring township, it should only be for the purpose of outlet; where outlet can be found within reasonable distance of the boundary. It cannot be that a few residents at the

(5) 21 U. C. P. 381, at p. 395. (6) 14 O. R. 294, at p. 298.

side of one municipality can initiate drainage proceedings from their land across the whole or greater part of an adjoining township against the will of the large majority of those interested. The self-governing powers of municipal bodies would be thus destroyed, and, besides, a minority in one township would be able to coerce a majority in another township."

The same principle would apply where, in order to benefit lands, in a small area or watershed, a very much larger watershed is made liable for assessment: See also *Gosfield South vs. Mersea* (7).

Accompanying this, my report, is a statement of my inspection, and the only effect given to it is in confirmation of the evidence taken apart from areas, and extent or fall in the lands.

For the reasons given I report, order and direct that the appeal of the township of Wallace be, and the same is hereby allowed, and that the assessment herein made by John Roger, Esq., O.L.S., upon lands and roads in the township of Wallace, be set aside, and that the drainage work proposed and provided for in the report appealed from be not proceeded with by the township of Elma, at the expense of the township of Wallace, upon the assessment made in said report.

I report, order and direct that the costs of the township of Wallace, of this appeal and reference, be paid by the township of Elma to the said township of Wallace, and that such costs be taxed by the clerk of the County Court of the county of Perth, at the city of Stratford, in the said county.

I further order and direct that the trial be considered as a trial of two days, and that stamps to the amount of eight dollars be affixed to this my report, and paid for by the township of Elma, and if affixed by the township of Wallace, the amount so paid shall be included in the costs to be taxed to said township.

There will be no costs of inspection.

## REPORT OF INSPECTION.

On Tuesday the 5th day of November, 1901, pursuant to my appointment herein, the inspection of the areas and localities affected, was made by me, in company with Messrs. Mabee and Davis for Wallace, and Messrs. Morphy and Roger for Elma. In the forenoon we drove into Elma and viewed the Spring Creek at various points, and its junction with the north branch in lot 2 in the 5th concession. At, above and below the junction, the lands are flat, and fallen trees, timber, flood-wood, and jams exist in the bed, and for a distance of about 30 rods on either side of the north branch, and across the town line into Grey. The flow of water is greatly checked and impeded by a ridge of gravel, about three-quarters of a mile long and thirty feet high, a short distance below the junction of Spring Creek and the north branch of the Maitland River. The north branch course around the ridge is over two miles, while across the neck of the ridge the distance from bed to bed of the north branch is less than half a mile. The banks up stream into Grey begin to rise and the river is fairly clear of obstructions. We also examined the course of the north branch through the town of Listowel. There are three dams across the stream, one of which is solid all the way across the stream. There are buildings standing on abutments and piles, over the bed of the branch.

In the afternoon we drove north through Gowanstown and inspected lands in Wallace, easterly to the town line, between Wallace and Maryborough. The bed of the river branch is very sinuous and much obstructed, and the flats in some parts are 15 to 20 rods wide on either side at the widest places. The land outside of the flats rises to an elevation of from 40 to 60 feet. There are ditches made under the Ditches and Watercourses Act leading into the north branch, from what Mr. Roger stated, but I did not see any of them owing to their not being in the course taken for inspection. The banks seem to increase in elevation up stream, and, at the town line of Wallace and Maryborough, they practically become hills with the river between. There is no artificial improvement in any part of the north branch.

Affirmed by Court of Appeal, March 6th, 1903.



## IN THE HIGH COURT OF JUSTICE.

In the matter of the Municipal Drainage Act.

LOVETT vs. COLCHESTER NORTH.

*Drainage By-law—Application to Set Aside—Procedure—Insufficient  
Petition—Drainage Area—Persons Benefited.*

The petition for a drainage work must be signed by a majority of the owners as shown by the last revised assessment roll within the drainage area who are assessed for benefit.

The evidence on an application by a ratepayer to set aside the engineer's report, plans, etc., directed to be taken by affidavit and cross-examination thereon.

J. H. Rodd, Esq., for applicant.

D. R. Davis, Esq., for Colchester North.

This was an application by Alfred Lovett, the owner of certain lands in Colchester North assessed for the work, to have set aside and declared void the petition, report, plans, estimates and assessments prepared for the purpose of constructing a drain along the course of the River Canard, a natural watercourse, in the townships of Colchester North and Anderdon. The work was undertaken by the former township under a petition presented to the council of that municipality. The petition described as the drainage area the bed of the river and the land adjoining the banks on either side, and running from the east side of the township to the west, the drain being carried by the report across the township of Anderdon for the purpose of obtaining a sufficient outlet at the Detroit River, into which the watercourse flowed. The length of the drain was about twenty miles, and the whole work was estimated to cost \$37,758.38, divided as follows: Assessment for benefit, \$6,037.51; injuring liability, \$27,-648.27; outlet, \$322.60, and bridges, \$2,750. The cost of the work in Anderdon was to be \$16,023. Of the total cost Colchester North was charged with \$24,153.66; Anderdon with \$4,861; Gosfield North with \$5,930.25, and the balance was divided amongst four other municipalities. Nearly all lands in Colchester North were assessed for the work.

The chief grounds upon which the application was founded were:

1. That the petition was not signed by a majority of those within the drainage area as described assessed for benefit.

2. That the petition was not signed by a majority of those within the drainage area, as described benefited within the meaning of the Drainage Act.

3. That the drainage area under the statute means the area covered by the lands actually assessed and not merely that described in the petition.

4. That there should have been an assessment for outlet equal to the cost of the work in Anderdon.

5. That the benefit was out of all proportion to the cost of the work.

The evidence was given by affidavits and cross-examinations, the Referee, after the application was launched, having upon a motion to fix the procedure, directed this course to be followed.

The application came on to be heard at Chatham before the Drainage Referee, J. B. Rankin, K.C., on February 13th, 1902, and the decision turned upon the first objection rendering it necessary to consider the others.

By the report only those whose lands lay in the bed of the stream were assessed for benefit, and from a comparison of the signatures to the petition with the last revised assessment roll at the time of the filing of the petition it was found that out of the seventy-five persons who were assessed for benefit only 37 had signed the petition. There were 46 names on the petition, but some were not assessed as owners on the roll, while the others, though within the drainage area, were not assessed for benefit. It was conceded, however, that if those within the drainage area but not assessed for benefit were properly to be counted, there was a larger number of others of the same class who had not signed the petition.

The result was, therefore, that the petition was declared to be invalid, and the order was granted with costs.

In the matter of the Municipal Drainage Act, and in the matter of the reports, plans, specifications, estimates and assessments of W. G. McGeorge, Esq., dated the 20th day of September, A.D. 1900, relating to the Henson Drain Outlet in the town of Dresden.

TOWNSHIP OF CAMDEN vs. TOWN OF DRESDEN AND  
TOWNSHIP OF CHATHAM.

*Resolution—Appointment of Engineer—Drainage Act, sec. 75—Repair  
of Highway—Assessment.*

The appointment of an engineer by resolution is not open to objection after the adoption of his report by a provisional by-law of the council appointing him.

Any municipality charged with the duty of keeping in repair the portion of a drain within its limits has authority under section 75 of the Municipal Drainage Act to initiate and carry out such improvements as may be necessary and advisable, although the drain (which passes through different municipalities) was initiated and constructed by another municipality.

Although the proposed work may be substantially for the repair and improvement of a highway by renewing a culvert or bridge, the municipality having jurisdiction over the highway is not bound to make the repairs rendered necessary by the construction and operation of the drain, at its own expense, but the lands and roads liable for the maintenance of the drain may be legally assessed for their proper proportions of the proposed work.

August 19th, 1902. J. B. Rankin, K.C., Drainage Referee.

Pursuant to my appointment I inspected the locality of the proposed work in company with Matthew Wilson, K.C., on behalf of the appellants, and J. W. Sharpe, Esq., on behalf of the respondents, the town of Dresden; and John S. Fraser, Esq., on behalf of the respondents, the township of Chatham, on the 13th day of November, A.D. 1901, and again on the 12th day of May, A.D. 1902, when George E. Weir, Esq., for appellants, and J. W. Sharpe, Esq., for the town of Dresden accompanied me. No person appeared for the township of Chatham, though duly notified. Immediately after the first inspection and in pursuance of my appointment I proceeded with the trial of the appeal herein.

Matthew Wilson, Esq., K.C., and George E. Weir, Esq., for appellants.

J. W. Sharpe, Esq., for respondents the town of Dresden, and John S. Fraser, Esq., for the respondents the township of Chatham.

The drainage work in question is known under different names, but for this report I shall adopt the name given it in the notice of appeal, that is to say, the Henson Drain.

Many years prior to the year 1886 a small drain was constructed from near the Erie & Huron Railway, now the Lake Erie & Detroit River Railway, lands northerly to the River Sydenham. It was not considered necessary in this appeal by counsel on either side to show the origin of the Henson drain, except in a very general way. Whether it was constructed under a by-law of the municipality or how otherwise does not appear from the evidence, but there is some evidence to show that where the drain crossed the river road on the south side of the River Sydenham its capacity was restricted to the space between two logs placed across the road, with a third log as a covering of the space between the other two. At some time later the logs were removed and a box or plank culvert was substituted, and its dimensions are given by Charles Stephens as two feet by fourteen inches, and by James Houston as two or three feet square inside measurement. The action of the water coming down the drain had the effect of washing away the sides of the drain across the road, and to remedy this and render the road fit for travel brushwood was placed over the box or plank culvert, and covered with earth. Allan McDonald says that the course through the road was steadily and yearly washed out wider, and he has known the drain for 35 years. The washout was 20 feet or more wide when the box culvert was put in. From the south side of the river road to the head of the drain at the Lake Erie & Detroit River Railway lands the drain was open; no part of it was covered except across the highway.

In the year 1885 a petition was presented by ratepayers of Camden to the council of the appellants to construct a drain "beginning in the ditch on the east side of the road

allowance between the 4th and 5th concessions in the Gore of Camden, about six feet south of the Erie & Huron Railway track, and continued south in the said ditch to the base line, thence west in the ditch on the north side of the base line to the blind line, between the east and west halves of lot number 1 in the 4th concession of the said Gore of Camden, thence north to the Stephens or Henson drain."

The petition further asks for the thorough draining of the locality among other things (see Exhibit 9).

In pursuance of this petition the council instructed Richard Coad, Esq., a Provincial Land Surveyor, to make a survey, take levels, make an assessment and estimate, and prepare plans for the enlargement and extension of the Henson drain. The report of the engineer is dated July 29th, A.D. 1885, and was adopted by by-law provisionally passed the 3rd day of August, 1885. There does not seem to have been anything further done upon this report, and no work was done under this by-law (see Exhibit 10).

On the 29th of May, 1886, the same engineer brought in another report (Exhibit 6), and prepared a plan and profile of the work (Exhibit 7).

This report provides for the deepening of the Henson drain from the River Sydenham south to its head at the Erie & Huron Railway lands, and then constructing a new drain to the south along the blind line of the 4th concession to the Watson drain on the base line, thence along the Watson drain east to the fourth concession line, thence north along the east side of the said fourth concession line to the Erie & Huron Railway, about twenty rods north of the line between lots 1 and 2; all of said work will be particularly shown on the plan and profile. Turning to the plan and profile, it appears that the extension of the drain is (49 1-8 stakes 2 chains apart) 98 1-4 chains, while the Henson drain proper was (19 1-8 stakes) 38 1-4 chains in length. It will also appear from the profile that the natural trend of the natural surface of the land is south from the south bank of the river to the base line, and this is corroborated by the evidence of W. G. McGeorge.

As appears by Exhibit 6, the lands and roads in Camden were assessed \$763, those in Chatham township \$70, and in the town of Dresden \$17. The report, Exhibit 6, together with the plan, estimates and assessments of Richard Coad, Esq., O.L.S., were adopted by the council of the township of Camden in the year 1886, and the work proposed was in due course proceeded with. According to the report the work started at the outlet of the Henson drain at the River Sydenham, while the evidence shows that the work, as done, commenced on the south side of the river road, leaving the drainage work across the road and to the River Sydenham in the same condition as it was at the time of the filing of the petition (Exhibit 9), and without making any provision for enlarging or extending the box culvert which then existed across the highway.

After the work was done from the head of the proposed drainage work to the south of the river road, it was soon found that the drainage work was ineffective and complaint was made by one Anderson, who owns the land through which the drainage work passed immediately south of the river road, that his house and barn were in danger of being undermined by the flow of water brought down by the drain to the south side of the road, and by reason of no sufficient outlet being provided across the highway the roadbed was being washed out into the river. To remedy this defective condition of the outlet and to protect the lands and buildings of said Anderson from the water brought down by the drainage work, the council of the township of Camden expended the surplus of money to the credit of the drainage work in making a covered drain from near the river to the highway, across the highway in the same line as the old box-culvert, which was removed, and extending southerly into the lands of said Anderson about 100 yards.

This improvement is described as being made of sewer tile, about two feet in diameter, cemented together at the joints, making a continuous underdrain of twenty-one rods in length. By reason of the washout on the northerly side of the road allowance, and for some distance into the road on

the northerly side, there was no solid or earth foundation for the sewer tile to rest upon, and an artificial bed was made of two tiers of three-inch plank, with side pieces so shaped as to keep the bottom part of the tile in place. This artificial support for the tile was itself supported by timbers on the northerly side of the road and by crib-work at the outlet, and through this crib-work an opening was made to permit the plank support and the tile to pass through, and there it ended.

The intake of the tile 21 rods south of the crib-work was somewhat protected by planking so as to direct the flow of the water from the open drain above into the head of the covered portion. The tile throughout about nineteen rods of its length was covered with earth and made level with the surface of the land and road. The remaining portion at the outlet was not covered and the work of improvement was thus completed.

The improvement above described did not, however, prove to be of a very permanent character, as the water from the open portion of the drain above found its way underneath the intake of the tile, and, in the course of time, forced its way through, under and along the tile to the northerly side of the road, and washed out the earth support of the tile and caused it to sink, breaking the joints and drawing back the plank support of the tile, and the tile itself from the crib-work already mentioned, and thereby caused the tile and its plank support to fall out of the crib-work altogether to the bottom of the washout. The effect then produced by the water was to wash away the roadway, carrying the timbers out of place and washing the roadbed completely away. The fence that separated the roadway from Anderson's property was shifted south to enable the road to be safely travelled. This was the condition of the work when the respondents sent on W. G. McGeorge to report on proper and permanent improvements to the drainage work so as to prevent damage to the highway. The above facts as stated I find to be fully established by the evidence, and corroborated in every respect by the inspection of the locality.

I further find and report that there was not at any time a natural watercourse of any description in the line of this drainage work, either through Anderson's land or across the highway, and that the drainage work is wholly artificial. Upon this state of facts the town of Dresden on the 21st August passed the following resolution:

"Moved by Mr. Tassie, seconded by Mr. McKim, that the mayor be authorized to employ W. G. McGeorge as engineer on the repairs of the Henson drain outlet. Carried." See exhibit 8.

The report of W. G. McGeorge appears in exhibit 1. The field plan and specifications are marked exhibit 2. The by-law of the town of Dresden by which the report, plans, specifications, assessments and estimates are adopted, provides that the improvement and repairs of the drainage work as therein indicated and set forth shall be made and constructed in accordance therewith. The township of Camden appealed from the report, plans, specifications, assessments and estimates of W. G. McGeorge dated 20th September, 1900, under the provisions of section 63; and reasons against appeal were, pursuant to order made by me, duly filed on 28th November, 1901.

At the trial of this appeal all the preliminaries were admitted to have been properly and regularly made. The appellants contend that the engineer, W. G. McGeorge, was authorized by resolution of the respondent and not by by-law, and by reason thereof no power is given to the engineer to make a report for the improvement of the drainage work. This objection I overrule upon the authority of *Tilbury East vs. Romney*, and *Tilbury North vs. Romney* (1). At page 264 the former learned Referee, B. M. Britton, Esq., K.C., says: "I hold for the purpose of this appeal that the appointment of Mr. McDonell by resolution was valid. In this case in addition to the original resolution the appointment was ratified by the adoption of his report, and this was adopted by by-law provisionally adopted on the 12th day of November, 1894."



In the case I am considering, the report, plans, specifications, estimates and assessments of the engineer made in pursuance of the resolution appointing him, already mentioned, were adopted by the council of the town of Dresden on the 8th day of October, A.D. 1900, and certified copies of such provisionally adopted by-law were served upon the reeve of Camden on the 11th day of May, 1901, and on the reeve of Chatham township on the 13th day of May, 1901. It is further argued by the appellants that the town of Dresden had no power under the provisions of section 75 of the Municipal Drainage Act to initiate the improvement of that portion of the drainage work lying within the limits of the town. By reference to the field plan, part of exhibit 2, it will be seen, and the evidence is clear in corroboration of the field plan, that all that part of the drain consisting of the twenty-one rods of the outlet lies wholly within the limits of the town of Dresden, and by the provisions of section 69 it becomes the statutory duty of the town of Dresden to keep that portion of the drain within its limits in repair. By section 75 express power is given to "the council of any of the municipalities whose duty it is to maintain the drainage work, without the petition required by section 3 of this Act, but on the report of an engineer or surveyor appointed by them," etc. I am of the opinion, therefore, that by the express provision of this section, the council of the town of Dresden has ample power to call upon an engineer and initiate the improvements of the drainage work contemplated by his report and specifications.

Another ground, and the principal ground of appeal to which nearly all the evidence was directed, was: "that the work proposed to be done is in substance a renewal of the culvert or bridge upon the highway in the town of Dresden, which the town of Dresden is bound to repair, and the proposed work is one in substance for the repair and improvement of such highway, and the municipality of Camden and the lands and roads therein are not liable therefor;" which is the fourth ground of appeal, and the same matter is referred to in other clauses of the notice of appeal in different

ways, but to the same effect. In dealing with this part of the case I find and report that before any drain was constructed across the highway there was no watercourse of any kind leading into the river, and therefore no bridge or culvert was then required for the road. I find and report that the culverts made of logs, already described, and more recently of plank, and finally of tile, were all rendered necessary by the construction of a drain leading water from the south against the fall of the surface of the land and into the river, which waters if taken in their natural course would have gone in other directions. I also find and report that the water was diverted from its natural course and taken into the river at this point for the benefit of the lands and roads drained by this drainage work from time to time as set forth in the report of Richard Coad, Esq., P.L.S., in exhibit 6, confirmed as it is by the evidence of W. G. McGeorge and by the inspection. I therefore hold that the covered portion of the drain at its outlet was, in 1887, when made, and has ever since continued to be part and parcel of the drainage work for the maintenance of which the lands and roads in the different municipalities assessed for its construction are liable. And that the liability to maintain that part of the drainage work across the road and north of the road towards the river is not a liability upon the town of Dresden alone, as for the repair and maintenance of a public highway.

I further find and report that the assessment is a fair, just and equitable assessment for the construction of the proposed improvement, which, in my judgment, will be of a permanent character, upon the lands and roads of the three municipalities interested, and that no satisfactory evidence has been given to show any improper or excessive assessments upon the lands and roads in the township of Camden. I come to this conclusion from the contents of exhibit 10, which is the first report made by Richard Coad, O.L.S., on the 29th July, 1885, to the council of the township of Camden, in which report he assessed lands and roads in the township of Camden only, and no assessment whatever was put by him upon lands and roads in the town of Dresden or the

township of Chatham; and upon the evidence of Francis Gifford, who was at this time reeve of the township of Chatham, where he states that this report was sent back to the engineer with instructions to assess the lands and roads in Dresden and Chatham, and which the engineer did assess by his second report, exhibit 6. In exhibit 6, the town of Dresden is assessed about two per cent. of the cost of the work, Chatham township about eight per cent., and Camden about ninety per cent., and this by the engineer of the township of Camden, while the assessment made by W. G. McGeorge is much more favorable to the appellants since he assesses Dresden eighteen per cent., Chatham township about seven per cent., and Camden about seventy-six per cent. of the cost of the proposed work. I further rely and base my findings upon evidence given by C. A. Jones, O.L.S., whose evidence appears very fair and was given in a very straightforward manner. He states that he has calculated the assessments upon a different basis from that of Mr. McGeorge, and, according to the result, too large an assessment is placed on the town of Dresden.

The affidavit of G. E. Weir, Esq., is improperly marked as "Exhibit 11, filed on the trial." This affidavit was filed on a chamber motion to admit the evidence of one Craig. The motion was allowed. Craig was called as a witness and his evidence was given. I therefore change the marking of the exhibit and place it as being filed on the motion, where it properly belongs.

The effect given to my report on inspection, in this, my decision, may be concisely stated as follows: It agrees with the evidence given by Mr. McGeorge upon the trend of the natural surface of the land. It corroborates his evidence and that of others as to there being no natural watercourse of any kind in the line of the Henson drain. It verifies the statement as to the cause of the washout and falling of the title to the bottom of the gulley so formed, and also as to the tiled portion of the drain across the highway being part of the drainage work and not a culvert. Reference may be had

to: Township of Orford vs. Howard (3), Broughton vs. Gray(4), In re Stonehouse and Plympton(5), In re Caradoc and Ekfrid (6), Township of Orford vs. Howard (7).

For the above reasons and upon my finding of facts, and the application of the law to such facts, I dismiss the appeal herein, with costs to be taxed at Chatham by the clerk of the County Court of the county of Kent, and to be paid by the appellants to the respondents. Each party shall bear its own cost of inspection.

I order and direct that the trial of this appeal be considered as lasting one day and one-half, and that the sum of six dollars be paid in stamps by fixing the same to this, my report, and that this sum be paid by the appellants. Should, however, the respondents or either of them affix the stamps, the said sum shall be included in their costs against the appellants and so repaid.

Affirmed by Court of Appeal, March 6th, 1903.

(3) 18 O. A. R. 496.

(5) 24 O. A. R. p. 416.

(4) 27 S. C. R. p. 495, at p. 499.

(6) 24 O. A. R. 576.

(7) 27 O. A. R. 223.

## IN THE HIGH COURT OF JUSTICE.

JOHN BYRNE vs. TOWNSHIP OF NORTH DORCHESTER.

*Motion to Quash By-law—Status of Applicant—Time—Defects in By-law—Estimates—Description—Amendment.*

It is not essential that a ratepayer applying to quash a drainage by-law should be specifically assessed for the proposed work.

Where notice of the motion to quash is given within the six weeks ensuing the final passing of the by-law, the motion may be heard after the expiration of such period.

A by-law is defective which does not provide for the work being done according to the report, plans, etc., as adopted.

Where the estimates do not comply with section 59 of the Drainage Act, which requires the cost of the work within each municipality and upon the road allowances to be estimated separately, the by-law adopting them is defective.

Instances of defective descriptions of lands.

The power of the Drainage Referee to amend by-laws is confined to provisional by-laws and does not extend to by-laws finally passed.

October 11th, 1902. J. B. Rankin, K.C., Referee.

This is an application on the part of John Byrne to set aside and declare void and quash by-law No. 380 of the township of North Dorchester, passed on the 28th day of July, 1902, and entitled the Dingman Creek Drainage By-law (1902), on the grounds set forth in the notice of motion.

Messrs. Macbeth & Macpherson, for applicant.

T. G. Meredith, Esq., for the respondents.

The applicant is owner in fee of ten acres of lot number fifteen in the first concession of the township of North Dorchester, and is assessed in respect thereof as a ratepayer of that township. He is also the owner of the north half of lot number two in the third concession of the township of Westminster and this land is assessed for \$117.

The township of North Dorchester is the upper and initiating township, and the township of Westminster is the lower, and both are situate in the county of Middlesex. The estimated cost of the proposed work is \$8,158.05. The lands and roads in North Dorchester are assessed \$4,338 and those in Westminster \$3,820.05.

The by-law in question was finally passed on the 28th day of July, A.D. 1902, and on the same day a notice of intention to apply to have the by-law quashed was duly served by the solicitor of the above named applicant on Henry Jackson, reeve of the township of North Dorchester, and also on Walter B. Lane, clerk of the municipality.

On the 6th day of September the notice of motion herein was duly served on the above mentioned reeve and clerk, setting forth the grounds upon which the applicant claimed that the by-law was defective and should be quashed, and the motion was made returnable before me on the 22nd day of September at the court house in the city of London.

The first objection raised by counsel for respondents was the status of the applicant. It was strongly contended that the ten acres owned by the applicant not being specifically assessed for any drainage facilities, but only generally as contributing to the general assessment on roads in the township of North Dorchester, such an owner could not apply to have the by-law quashed. It was urged that only the owners of lands specifically assessed by the engineer in his report and on whom a copy of the by-law was served under section 22 could apply to quash the by-law under section 23. Taking into consideration the provisions of sections 21, 22, and 23, and the following cases: *Re De la Haye vs. Toronto* (1), and *Re Boulton vs. Peterborough* (2), I am of opinion that this objection is not well founded and it is therefore overruled.

The next objection is to the time of making the application. It is contended that the notice of motion should be given ten days before the motion can be made, and both the notice of motion and the hearing of the motion must be within the six weeks mentioned at the end of the by-law. Here the notice of motion was served and affidavits filed on the sixth day of September, within the six weeks, and the motion was heard on the 22nd day of September outside of the limit of six weeks.

I am clearly of opinion that this objection is untenable: *Re Sweetman vs. Gosfield* (3), *Re Shaw vs. St. Thomas* (4).

At page 297, in the former case, Mr. Justice Street says: "That the summary proceedings of a motion to the Court, whether it be to set aside an award or to quash a by-law, stands in the place of an action brought for the same purpose, and that the service of a notice of motion is as clearly the commencement of the one proceeding as the issue of a writ of summons is of the other."

At page 457, in the latter case, Mr. Justice Osler says: "As to section 23, R. S. O. 226, the Municipal Drainage Act, under which the case last cited arose, I think it only more clearly expresses the present practice, and, indeed, considering that these acts, as part of a single consolidation of the statute law, are in *pari materia*, and that the sections referred to in both deal with similar proceedings, it justifies the larger construction of the meaning of the word 'application' in sec. 399."

I find and report that the by-law in question is defective in not complying with secs. 18, 19, sub-secs. 1 and 20 in omitting the clause authorizing the work to be done according to the report, plans, specifications, assessments and estimates as adopted.

I further find and report that the said by-law is defective in regard to the estimates as adopted and in violation of the express provision of sec. 59, which enacts that the estimated cost of the proposed work within the municipalities and upon the road allowance shall be made separately.

I further find and report that the descriptions of lands are too vague and indefinite. A few examples out of the twenty-eight complained of will suffice:

- S. pt. 8 and 9 in the 1st concession of Westminster, 50 acres.
- S.E. pt. 22 in 1st concession of North Dorchester, 40 acres.
- S. pt. 24 in 1st concession of North Dorchester, 30 acres.
- E. pt. S. hf. 24 in 1st con's'n of North Dorchester, 20 acres.
- S.W. pt. 14 in 2nd concession of North Dorchester, 35 acres.
- S.E. pt. 14 in 2nd concession of North Dorchester, 14½ acres.
- Pt. S.E. pt. 14 in 2nd concession of North Dorchester, 50 acres.

Such descriptions as these have been held to be invalid, in *Jenkins vs. Enniskillen*(5), *Cassidy vs. Mountain*(6), and also in a case against the township of Caven (not reported), where Mr. Justice Street set aside the by-law of the township on this ground. See also *South Dorchester et al. vs. Malahide*(7). As to portions of two lots assessed together, see *Ridout vs. Ketchum*(8), *Laughlinborough vs. McLean*(9), and *McDonald vs. Robillard* (10).

I further find and report that there is a confusion in the description of the lots assessed north and south of the river, without distinction as appears from the deposition of the township clerk: See *Lount vs. Walkington*(11).

I further find and report that the copies of the by-law served were not true copies of the by-law as finally passed. The corrections made in the copy of the by-law filed were made after the service of the copies and not before.

It was strongly urged by counsel for respondents that I possessed the power of amending the by-law so as to remedy all the defects in it, and cited in support of this contention *Dover vs. Chatham*(12), and also *South Dorchester et al. vs. Malahide*(13). The former case has no application to the case, and the latter was an appeal from a report which had been adopted by a by-law provisionally and not finally passed. Express power is given to the Referee to amend "Any provisional by-law in question." Although such power is given to the Referee he declined to exercise it in the *South Dorchester et al. vs. Malahide* case above referred to.

The simple question in this case is: Has the Referee power under the statute to amend a by-law finally passed? He can determine the validity of it under the power conferred upon him by sub-sec. 3 of sec. 89, and he can also amend and correct any provisional by-law in question. I am of the

(5) 25 O. R. 406.

(9) 14 C. P. 175.

(6) C. L. T. (1897), p. 419.

(10) 23 U. C. R. 105.

(7) *Clarke & Scully*, p. 275 at p. 281.

(11) 15 Chy. 332.

(8) 5 C. P. p. 50.

(12) 11 O. A. R. p. 274.

(13) *Clarke & Scully*, p. 275, at p. 281.



opinion that his power ends with provisional by-laws, and that a by-law finally passed is beyond his power to amend. See *Gosfield North vs. Rochester* and *Mersea vs. Rochester* (14).

On this point it is contended on behalf of the respondents that, under sub-sec. 2 of sec. 89, as amended by 1 Edw. VII. ch. 30, sec. 3, power is given the Referee in all applications and proceedings before him to correct errors and supply omissions. This sub-section deals largely with procedure and cannot, in my judgment, be construed so as to cover the provisions of sub-section 3, and extend the power of the Referee as therein set forth to the amendment of by-laws finally passed.

For the reasons above given, I find and report that the by-law in question herein is an illegal by-law and is hereby quashed and set aside, with costs to the applicant to be taxed by the clerk of the County Court of the county of Middlesex.

(14) *Clarke & Scully*, p. 182.

MISCELLANEOUS DECISIONS RELATING TO THE  
MUNICIPAL DRAINAGE ACT, AND PROCEED-  
INGS THEREUNDER.

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IN THE HIGH COURT OF JUSTICE.

CROOKS vs. TOWNSHIP OF ELLICE.

HILES vs. TOWNSHIP OF ELLICE.

(Reported 16 Prac. Rep. 553.)

*Costs—Taxation—Drainage Actions—Appeal—Reference to Drainage  
Referee—Costs Awarded on Appeal.*

Where actions begun in the High Court were referred at the trial to the Drainage Referee, and upon appeal from his report an order was made by an appellate Court for taxation and payment of costs of the actions:—

Held, that they were not costs coming within the provisions of sec. 24, sub-sec. (4), of the Drainage Trials Act, 1891, but were to be taxed in the usual way in which costs of actions are taxed, and subject to the same right of appeal.

December 6th, 1894. Meredith, J.

An appeal by the defendants from the taxation by the local Registrar at Stratford of the plaintiffs' costs of these actions awarded by the judgment of the Supreme Court of Canada. The actions were brought in the High Court in respect of disputes arising under the drainage laws, and at the trial an order was made referring the matters in question to the drainage referee. From his decision an appeal was had to the Court of Appeal and a subsequent appeal to the Supreme Court of Canada, which awarded costs and damages to the plaintiffs.

The appeal was brought on for argument before Meredith, J., in Chambers, on the 30th November, 1894, when

W. M. Douglas and J. P. Mabey, for the plaintiffs, objected that no appeal lay.

J. M. Clark and J. H. Moss, for the defendants, contra.

Judgment on the preliminary objection was delivered on the 6th December, 1894.

Meredith, J.:—The costs in question are the costs of actions in this Court ordered to be taxed and allowed, and paid, in and by the judgments of the Supreme Court of Canada, made in the actions: and are not costs which the Referee has, under the provisions of the Drainage Trials Act, 1891, disposed of or dealt with.

They are not, in my opinion, costs coming within the provisions of sec. 24, sub-sec. (4), of the Act.

The actions were brought in the High Court, and remained there until the order of reference was made at the trial, when they passed under the jurisdiction of the Referee acting under the Act in question: and, had the cases gone no further, the disposition of the question of costs (sec. 19) and the taxation of them (sec. 24, sub-sec. (4)) might have rested with the Referee: but, by way of appeal from the Referee's reports, the actions came back to the ordinary Courts of law; and one of those Courts has dealt finally and definitely with the question of costs, and expressly directed that they be taxed and allowed as it has awarded them: and that direction, which is in the ordinary form, I take to mean a taxation in the usual way, and subject to the usual right of appeal: just as I suppose the damages, awarded the plaintiffs by the same judgment, may be recovered in the actions in the usual way: and just as the parties now objecting treated their bills of costs, entitling them, drawing them, and having them taxed, as costs of, and in, the original actions and Courts.

I, therefore, overrule the objection: the appeals must be heard upon their merits: any additional costs of the appeal caused by this objection will be costs in the appeal.

[NOTE.—The question whether an appeal lies to a Judge of the High Court from the taxation by a County Court clerk, under the direction of the Drainage Referee, of costs awarded by the latter in actions begun in the High Court and referred to him, was raised before Armour, C.J., in *Fewster vs. Township of Raleigh*, 31 C. L. J. 287, 15 C. L. T. Occ. N. 137; and before Rose, J., in *Tindell vs. Township of Ellice*, 28th June, 1895; but was not decided, owing to the appeal in each case being dismissed upon the merits.]

## IN THE HIGH COURT OF JUSTICE.

FEWSTER VS. TOWNSHIP OF RALEIGH.

(Reported 31 Canada Law Journal, 287.)

*Costs—Scale of—Drainage—Action—Reference—54 Vict. ch. 51, sec. 24 (3).*

Action brought in the High Court of Justice, in 1890, to recover damages for injuries caused to the plaintiff's land by reason of the negligent construction of certain drains by the defendants, and by reason of their omission to keep such drains in repair, and for a mandamus.

After a judgment referring the action to a special Referee, set aside by the Court of Appeal, 14 P. R. 429, an order was made under sec. 11 of the Drainage Trials Act, 1891, 54 Vict. ch. 51, referring the action to the Drainage Referee, who made his report in favour of the plaintiff, assessing damages at over \$500 and allowing the plaintiff costs. He referred the taxation of the plaintiff's costs to the clerk of the County Court of the county of Kent, who taxed them upon the scale of the County Courts.

The plaintiff appealed from the taxation to a Judge of the High Court in Chambers.

W. H. Blake, for the plaintiff, contended that as the proceedings were begun by action in the High Court and the Drainage Referee acquired his jurisdiction by an order of reference under sec. 11 of 54 Vict. ch. 51, and not by proceedings under secs. 5, 6, and 7, and as the amount recovered by the plaintiff was beyond the jurisdiction of the County Court, the costs should be on the scale of the High Court, relying on 55 Vict. ch. 57, sec. 6 (2) and 57 Vict. ch. 56, sec. 114.

H. W. Mickle, for the defendants, contended that no appeal lay from the taxation by the clerk of the County Court to a Judge of this Court, and that, at all events, the costs were properly taxed on the scale of the County Court, in accordance with 54 Vict. ch. 51, sec. 24 (3), and 57 Vict. ch. 56, sec. 109, no other tariff having been framed.

April 5th, 1895.

Armour, C.J., held that the costs were properly taxed upon the County Court scale, no provision to the contrary having been made in the order of reference.

Appeal dismissed with costs.

## IN THE HIGH COURT OF JUSTICE.

McCULLOCH vs. TOWNSHIP OF CALEDONIA.

Reported 19 Prac. Rep. 115.

*Costs—Scale of—Drainage Act—Reference.*

Section 113 of the Drainage Act, R. S. O. ch. 228, providing that the tariff of the County Court shall be the tariff of costs under that Act, applies only to actions which ought properly to have been instituted by notice under sec. 93, and not to actions which might properly be brought notwithstanding the Drainage Act, and which are referred to the Referee under sec. 94 only because the Court thinks they may be more conveniently disposed of by him.

[January 24, 1899—The Court of Appeal.]

This was an action for damages for injuries sustained by reason of water brought upon the plaintiff's land by the negligence of the defendants. The action was brought in the High Court, and was referred to the Drainage Referee by order of the trial Judge made at the sittings at which it had been set down for trial. The Referee tried it and made his report, which was varied by the judgment of the Court of Appeal (1898), 25 A. R. 417.

After the judgment a question arose, upon the settlement of the certificate, as to the scale upon which the costs of the action and of the reference were to be taxed, and the matter was brought before the Court.

The question was argued on the 5th December, 1898, before Burton, C.J.O., Osler, Maclellan, and Moss, JJ.A.

J. H. Moss, for the plaintiff, contended that he ought to be allowed all costs in the Court below on the High Court scale, including the costs of the reference. He referred to Crooks vs. Township of Ellice (1).

J. B. O'Brien, for the defendants, contended that the costs of the reference ought to be allowed upon the County Court scale only, relying upon sec. 113 of the Drainage Act, R. S. O ch. 226.\* He cited *Sage vs. Township of West Oxford* (2).

Judgment was delivered on the 24th January, 1899.

The Court held that the plaintiff was entitled to full costs of the reference upon the High Court scale, being of the opinion that section 113 applied only to cases which ought properly to have been instituted by notice under section 93\* of the Drainage Act, and did not apply to actions which might properly be brought notwithstanding the Drainage Act, and which are referred to the Referee under section 94† only because the Court or a Judge thereof thinks they may be more conveniently tried before and disposed of by the Referee.

(2) (1892) 22 O. R. 678.

\*113. Until other provisions are made under the last two preceding sections, the tariff of the County Court shall be the tariff of costs and of fees and disbursements for solicitors and officers under this Act. . . .

\*93.—(1) In case a dispute arises . . . as to damages alleged to have been done . . . in the construction of drainage works . . . the municipality, company, or individual complaining may refer the matter to the arbitration and award of the said Referee. . . .

†94. Where an action of damages is brought and in the opinion of the Court the proper proceeding is under this Act, or the action may be more conveniently tried before and disposed of by the Referee, the Court . . . may . . . make an order transferring or referring it to the Referee.

## IN THE HIGH COURT OF JUSTICE.

MOKE vs. TOWNSHIP OF OSNABRUCK.

Reported 19 Prac. Rep. 117.

*Costs—Scale of—Drainage Act—Reference.*

Where an action is brought to recover damages for injury to property by the construction of drainage works, and the claim is within the scope of sec. 93 of the Drainage Act, R. S. O. ch. 226, under which proceedings before the Drainage Referee may be taken without bringing an action, and an order is made referring the action to the Referee for trial, the costs should be taxed according to the tariff of the County Courts, under sec. 113.

February 26, 1900. Armour, C.J.

An appeal by the defendants from the taxation of the plaintiff's costs of an action which was referred to the Drainage Referee.

The appeal was heard by Armour, C.J., in Chambers, on the 19th February, 1900.

Cattanach, for the defendants, contended that the costs should have been taxed on the scale of the County Courts under section 113 of the Drainage Act, R. S. O. ch. 226.

J. H. Moss, for the plaintiff, relied on the decision of the Court of Appeal in *McCulloch vs. Township of Caledonia*, 24th January, 1899.\*

Judgment was delivered on the 26th February, 1900.

Armour, C.J.:—

In this action the plaintiff claimed from the defendants damages alleged to have been done to his property in the construction by the defendants of drainage works or consequent thereon, and such claim was, in my opinion, within the scope of the provisions of sub-section 1 of section 93 of the Municipal Drainage Act, R. S. O. ch. 226, and proceedings might have been taken in the manner provided by sub-sections 2 and 3 of said section.

\*Now reported *ante*.

The plaintiff, however, brought this action, and, after issue joined, obtained an order referring it to the Referee under the Drainage Laws, who tried the same and gave judgment for the plaintiff for \$400 and costs, which costs the taxing officer taxed according to the High Court tariff, and the defendants appealed; contending that under section 113 of the said Act, no other provisions having been made under sections 111 and 112 of the said Act, the costs ought to have been taxed according to the tariff of the County Court.

In a similar case to this, *Fewster vs. Township of Raleigh*, (1), I held that the costs ought to be taxed according to the tariff of the County Court, but I am told that in a case of *McCulloch vs. Township of Caledonia* the Court of Appeal overruled this decision, but no judgment to that effect has been produced, and I cannot follow a hearsay precedent, but must adhere to my former decision until proper evidence of its having been overruled can be produced.

The appeal will, therefore, be allowed with costs.

(1) (1896) 31 C. L. J. 287, 15 C. L. T. Occ. N. 137.



RE TOWNSHIP OF METCALFE AND TOWNSHIPS OF ADELAIDE AND WARWICK.

RE TOWNSHIP OF COLCHESTER NORTH AND TOWNSHIP OF GOSFIELD NORTH.

Reported 19 Prac. Rep. 188.

*Costs—Scale of—Appeal from Judgment of Drainage Referee.*

Having regard to secs. 111, 112, and 113 of the Municipal Drainage Act, R. S. O. ch. 226, and no tariffs of fees having been framed thereunder, the tariff of the County Courts applies, not only to proceedings before the Drainage Referee, but to appeals from his decisions; and therefore the basis of taxation of the costs of an appeal to the Court of Appeal from the decision of the Referee should be the County Courts tariff.

May 7, 1900—Meredith, C.J.

July 3, 1900—Divisional Court.

An appeal by the corporation of the township of Metcalfe from the taxation of the costs of the corporations of the townships of Adelaide and Warwick incurred in the Court of Appeal; and an appeal by the corporation of the township of Gosfield North from the taxation of the like costs of the corporation of the township of Colchester North.

The proceedings in both cases were instituted under section 93 of the Municipal Drainage Act, R. S. O. ch. 226, by notice, and not by action. In each case there was an appeal to the Court of Appeal from the decision of the Drainage Referee under section 110 of the Act, and such appeal having been determined by the Court of Appeal in favour of the townships of Adelaide and Warwick in the one case, with costs payable to them by the township of Metcalfe, and in favour of the township of Colchester North in the other case, with costs payable to them by the township of Gosfield North, the taxing officer taxed these costs upon the High Court and Court of Appeal scale. The judgment of the Court of Appeal did not define the scale of costs, but simply allowed "costs of the appeal" to the successful party.

The appeal in the first case was heard by Meredith, C.J., in Chambers, on the 27th April, 1900.

Folinsbee, for the corporation of Metcalfe.

C. A. Moss, for the corporations of Adelaide and Warwick.

Judgment was delivered on the 7th May, 1900.

Meredith, C.J.:—

Appeal from the taxation by the senior taxing officer of the costs in the Court of Appeal of an appeal under the Drainage Act which was dismissed with costs.

The costs were taxed upon the High Court scale, and the appeal was rested upon the ground that, according to the provisions of the Act, County Court costs only are taxable, even for the proceedings in the Court of Appeal.

It was conceded on the argument that ever since the Act was passed it has been the practice to tax the costs in the Court of Appeal upon the High Court scale; and while I am not free from doubt as to what the proper construction of the statute is, if the matter were *res integra*, I do not think it would be proper to disturb this practice, which has so long and uniformly prevailed, and which I think is a practice that would have been adopted if the power to pass Rules and to frame a tariff, which is conferred by the Act, had been exercised.

There is a great deal to be said in favour of the view that the Legislature had not in contemplation, in providing that the scale of costs should be that of the County Court, the costs of proceedings in the Court of Appeal, and I decide the case against the appellants because I am not able to say that the practice which has prevailed is wrong.

I dismiss the appeal with costs on the High Court scale.

The corporation of the township of Metcalfe appealed from the order of Meredith, C.J.; and the appeal of the corporation of the township of Gosfield North was referred by Rose, J., to a Divisional Court for hearing.

Both appeals were heard by a Divisional Court composed of Armour, C.J., and Street, J., on the 4th June, 1900.

Riddell, Q.C., for the corporation of the township of Gosfield North, and Folinsbee, for the corporation of the township of Metcalfe, contended that the costs should be taxed according to the tariff applicable to the County Court appeals, or, if not, that there was no tariff upon which they could be taxed.

Langton, Q.C., for the corporation of the township of Colchester North, and C. A. Moss, for the corporations of the townships of Adelaide and Warwick, opposed the appeal.

McCulloch vs. Township of Caledonia (1), Moke vs. Township of Osnabruck (2), Fewster vs. Township of Raleigh (3), Re Township of Raleigh and Township of Harwich (4), Holmes vs. Bready (5), were referred to.

On the 3rd July, 1900, the judgment of the Court was delivered by

Street, J.:—

With the greatest respect, I feel bound to differ from the opinion of the Chief Justice of the Common Pleas, against which this appeal is brought, because I think the question is governed by a statute too clear to be disregarded.

Section 111 of chapter 226 gives to the Judges of the Supreme Court of Judicature for Ontario the same authority to make "rules with respect to proceedings before the Referee and appeals from him as they have with respect to proceedings under the Judicature Act."

Section 112 gives to the Drainage Referee power (subject to any rules framed by the Judges under section 111) to frame rules regulating the practice and procedure before him, and to frame tariffs of fees; and by sub-section (2) it is provided that "such rules and tariffs, whether made by the Judges or the Referee, shall be published in the Ontario Gazette and shall thereupon have the force of law," etc.

(1) (1890) 19 P. R. 115.

(2) (1900), *ib.* 117

(3) (1895) 31 C. L. J. 287, 15 C. L. T. Occ. N. 137.

(4) (1898) 18 P. R. 73.

(5) (1898), *ib.* 79, 59 Vict. ch 18, sec. 15 (O.).

Section 113 then provides that "until other provisions are made under the last two preceding sections the tariff of the County Court shall be the tariff of costs and of fees and disbursements for solicitors and officers under this Act." etc.

I have been unable to find anything subsequently enacted which impairs the effect of section 113. The Consolidated Rules which came into effect on the 1st September, 1897, contain no reference to proceedings under the Municipal Drainage Act, and therefore sec. 15 of ch. 18 of 59 Vict. (O.), to which we were referred, does not affect the matter. The unrepealed law upon the statute book, therefore, provides in plain terms that until the Judges by Rule make some other provision and publish it in the Ontario Gazette, the tariff of the County Courts shall apply not only to proceedings before the Referee but to appeals from him. It was argued that the Consolidated Rules of 1897 have been held to govern appeals under the Drainage Act, and that therefore the tariff provided by those Rules for the costs of appeal to the Court of Appeal governs the costs of Drainage appeals. The Consolidated Rules, however, only govern Drainage appeals by reason of their analogy to High Court appeals, and only in so far as they are applicable; but here we have a distinct statutory provision with regard to costs which forbids our applying any tariff but that of the County Courts until another tariff has been framed and published in the Gazette—and that has not been done. For these reasons I am of opinion that the appeal should be allowed, with costs here and below, and that the bills of costs should go back to the taxing officer with instructions to tax them using the County Court tariff as the basis of taxation.

Judgment of Divisional Court reversed. See next page.

## IN THE COURT OF APPEAL.

RE TOWNSHIP OF METCALFE AND TOWNSHIPS OF ADELAIDE AND WARWICK.

RE TOWNSHIP OF COLCHESTER NORTH AND TOWNSHIP OF GOSFIELD NORTH.

Reported 2 O. L. R. 103.

*Costs—Scale of—Appeal from Judgment of Drainage Referee.*

The costs of an appeal to the Court of Appeal from the decision of the Drainage Referee in a proceeding under the Drainage Act initiated before him should (if awarded to either party) be taxed on the scale applicable to appeals in cases begun in the High Court of Justice.

Decision of a Divisional Court, 19 P. R. 188, reversed.

Appeals by the corporations of the townships of Adelaide and Warwick in the first matter and by the corporation of the township of Colchester North in the second matter, from the orders of a Divisional Court allowing an appeal by the corporation of the township of Metcalfe from an order of Meredith, C.J., dismissing an appeal from the ruling of a taxing officer as to the scale upon which the costs of an appeal to the Court of Appeal from a decision of the Drainage Referee should be taxed, and allowing an appeal by the corporation of the township of Gosfield North from a like ruling. The Divisional Court held (19 P. R. 188) that the County Courts tariff should be the basis of taxation of such costs.

The appeal was heard by Osler, MacLennan, Moss, and Lister, J.J.A., and Lount, J., on the 12th June, 1901.

T. Langton, K.C., and C. A. Moss, for the appellants.

J. Folinsbee and H. E. Rose, for the respondents.

June 14. The judgment of the Court was delivered by

Osler, J.A.:—

The only question is, whether the costs of the appeals to this Court from the award of the Referee before whom the

proceedings were initiated under the Drainage Act should be taxed on the scale of costs applicable to appeals from the County Court to the High Court, or on the scale applicable to ordinary appeals from the High Court to this Court. In both cases the taxing officer taxed the costs on the latter scale. His taxation was affirmed by Meredith, C.J., on appeal in the Adelaide case. From his judgment an appeal was taken to the Divisional Court, to which Court an appeal from the taxation in the Colchester case was referred by the Judge before whom it came. In the result the judgment of Meredith, C.J., was reversed and the appeals from the taxing officer in both cases allowed. Leave to appeal was afterwards granted, and the appeals are now to be disposed of.

We intimated on the argument that it would probably be found that the point had already been decided by this Court in *Re Township of Dover and Township of Chatham*,\* an appeal in a drainage case which originated, like the present, before the Referee. We find that judgment was delivered in that case on the 29th of June last, after a full argument, on the motion to settle the minutes, affirming the right of the successful party to tax his costs (where costs were adjudged) of the proceedings in appeal on the ordinary scale of costs in appeals from the High Court, and that, upon the true construction of the various sections of the Drainage Act, such costs were not taxable, as the costs of the proceedings before the Referee are taxable, on the County Court scale. We had already laid that down as the rule where the appeal was from the report of the Drainage Referee in an action: *McCulloch vs. Township of Caledonia* (1), and it appeared to us, after the best consideration we were able to give to the question (undoubtedly one not free from difficulty), that the costs of an appeal from a report in a proceeding instituted before the Referee should be allowed and taxed in the same way.

We see no reason for receding from our former decision; and the appeals must, therefore, be allowed and the taxing officer's taxation affirmed with costs throughout.

## IN THE HIGH COURT OF JUSTICE.

CHALLONER vs. THE CORPORATION OF THE TOWNSHIP OF  
LOBO, ET. AL.

Reported 32 O. R. 247.

*Municipal Corporation—Drainage By-law—Petition for—Qualification of Petitioners.—“Last Revised Assessment Roll”—“Exclusive of Farmers’ Sons not Actual Owners”—Meaning of—Interest in Land—Invalid By-law—Damages.*

The assessment roll last revised previous to the passing of a drainage by-law is the one to be looked at for the purpose of ascertaining whether the petition for the work was sufficiently signed to authorize the passing of the by-law.

The words “exclusive of farmers’ sons not actual owners” in subsec. 1 of sec. 3, R. S. O. 1897 ch. 226, do not refer to farmers’ sons who are not actual owners in fact, but to farmers’ sons so shown by the last revised assessment roll.

An arrangement between a farmer and his sons by which he promised to convey the farm to them, he retaining a life interest, is sufficient to give them an interest in the land of a freehold nature, entitling them to be assessed as joint owners, and so assessed, they are not “farmers’ sons not actual owners.”

The by-law in question in this action was declared invalid, the petition therefor not having been properly signed within the meaning of sec. 3, but not having been quashed, the plaintiff was held not entitled to damages for work done under it.

Connor vs. Middagh and Hill vs. Middagh (1), and McCulloch vs. Township of Caledonia (2), followed.

This was an action, commenced on the 21st of December, 1899, for an injunction to restrain the defendants from constructing a drain, under a by-law passed pursuant to the provisions of the Municipal Drainage Act, R. S. O. 1897 ch. 226, upon the ground that the petition therefor was not signed by a sufficient number of properly qualified property owners, and for damages.

The action was tried at London on the 24th of March, 1900, before Meredith, C.J., without a jury.

It appeared that the petition was presented on the 10th April, 1899, at which date the last revised assessment roll was that of 1898, and a majority of the owners of land to be benefited as appeared by that roll had signed the petition.

(1) (1889) 16 A. R. 356.

(2) (1898) 25 A. R. 417.

The engineer made his report on the 2nd of August, and it was adopted by the council on the 21st of August, and the by-law was finally passed on the 9th October, 1899; the assessment roll for the year 1899 having been in the meantime finally revised some time previous to the 1st of August.

On the roll for 1899 there appeared the names of 31 owners of land to be benefited of whom 15 had signed the petition.

The defendants contended in support of the by-law that a majority had signed the petition, because out of the remaining 16 landowners at least five were not entitled to be taken into consideration, they being "farmers' sons not actually owners," viz., Alfred J. Campbell, George A. Craven, John R. Craven, Malcolm A. McKellar and Archibald D. McKellar.

The evidence showed that Alfred J. Campbell was a farmer's son living with his father, and was not an owner, but was assessed as a freeholder jointly with his father; that Malcolm A. McKellar and Archibald D. McKellar were living with their father on a village lot in Komoka; their father also owned two acres of land in the drainage area cultivated as a vegetable garden; the father and sons were assessed as joint owners of the village lot and the two acres, but the sons were not owners in fact; and that George A. Craven and John R. Craven were farmer's sons living with their father on his farm, were assessed as owners jointly with their father, but were not owners in fact; the father, it was alleged, had promised to give them the farm "when he was done with it" if they would stay with him, and was willing and had some time previously offered to convey the farm to the sons, retaining a life lease in himself.

T. G. Meredith, for the plaintiff, contended that there was no jurisdiction to construct the drain unless the petition was properly and sufficiently signed, and that the last existing revised assessment roll, viz., that of the year 1899, was the one which governed and referred to secs. 17 and 18 of the Municipal Drainage Act, R. S. O. 1897 ch. 226.



Macbeth, for the defendant corporation, contended that farmers' sons might be jointly assessed with their father as if owners with him, and that the words in parenthesis in section 3 of the Drainage Act excluded them, when so assessed; that the roll of 1898 was the governing one; that the merits were with the defendant corporation; and that no damages could be recovered as the by-law had not been quashed; he referred to *Rose vs. Township of West Wawanosh* (3), *South Dorchester and Dereham vs. Malahide* (4), *McCulloch vs. Township of Caledonia* (5).

Meredith, in reply, referred to *York vs. Township of Osgoode* (6), *Re Robertson and the Municipal Council of the Township of North Easthope* (7), *Alexander vs. The Corporation of the Township of Howard* (8).

A. Stewart, appeared for the defendant Oliver, who had entered into a contract with the township to dig the drain.

June 18, 1900. Meredith, C.J.:—

The main question in dispute is as to the sufficiency of the petition to support the by-law under which the drainage work, the doing of which is sought to be restrained, was undertaken; it being conceded by the defendants that unless the petition was signed by the required proportion of the property owners interested, the by-law cannot be sustained.

The first question to be determined is what assessment roll, that of 1898 or that of 1899, is to be looked at for the purpose of ascertaining whether the petition was sufficiently signed to authorize the passing of the by-law.

The petition to afford a foundation for action by the municipality must be by "the majority in number of the "resident and non-resident persons (exclusive of farmers' sons not actual owners) as shown by the last revised assessment roll to be the owners of the lands to be benefited, etc.," R. S. O. 1897 ch. 226, sec. 3.

(3) (1890) 19 O. R. 294.

(4) (1895) 1 Clarke & Scully's Drainage Cases, 275.

(5) (1898) 25 A. R. at p. 427.

(6) (1892) 24 O. R. 12; (1894) 21 A. R. at p. 171.

(7) (1889) 16 A. R. 214.

(8) (1886) 14 O. R. 22.

The petition in question was presented to the council on the 10th April, 1899, and the then last revised assessment roll of the municipality was that of 1898, and on that day the municipal clerk was by resolution of the council "instructed to ask the township engineer to make plans, specifications and detailed estimates of the drain to be constructed and to report to the council."

The engineer handed his report to the clerk on the 31st July, 1899, and thereupon the clerk gave to the property owners affected by it the notice required by section 16 naming the 14th August following, as the day on which the council would meet to read and consider the report, in accordance with the provisions of section 17.

The meeting was held on the 14th August, 1899; at it a number of ratepayers were present, and an opportunity was given to anyone who had signed the petition to withdraw from it, and to anyone who had not signed an opportunity to sign it.

Owing to some incompleteness in the assessment, the meeting was adjourned for a week to procure the engineer to correct it, which was done, and on the 21st August, 1899, the report as amended was adopted and the clerk was instructed to prepare the necessary by-law.

The by-law was provisionally adopted on the 4th September, 1899, and was finally passed on the 9th October following. I omit the proceedings between these dates, as nothing turns upon them.

The assessment roll of the municipality for 1899 was finally revised before the 1st August of that year, but on what day was not made to appear in evidence, and the exact date is not material.

The by-law, the form of which is provided for by section 20, which, as I have said, was provisionally adopted on the 4th September, 1899, and finally passed on the 9th October following, recites the petition and that it was by "a majority . . . as shown by the last revised assessment roll;" so that the roll of 1899 is on the face of the by-law treated as the governing one.

The meeting held in accordance with the provisions of section 17 was, as has been seen, held after the roll of 1899 had been revised, and by section 18 in order to justify action by the council upon a petition it must appear at the close of the meeting of the ratepayers that the petition contains the "names of the majority of the persons shown as aforesaid;" that is to say, as I read the section, by the last revised assessment roll to be the owners benefited within the area described.

Looking at the machinery provided by the Act it seems to me that what is contemplated is that at the time action is taken by the council by passing the by-law, the council must have before it a petition for the work signed by the necessary majority according to the then last revised assessment roll, and accordingly provision is made for the withdrawal from and the addition to the petition of names of property owners affected, and if the result be that after such withdrawals and additions the petition has upon it the names of a majority of these owners, as shown by the then last revised assessment roll, the council may proceed to pass the necessary by-law, but if such a majority is not shown the proceedings end with the meeting under section 17.

Difficulties in the way of adopting this construction of the Act may be suggested, but it is to be observed that the petition is the basis for the taxation of the property owners, and for interfering with their lands for the purpose of the contemplated work at the will of the majority and against the wishes of the minority, and if in such a case as this, the roll, which was the last revised assessment roll at the time the petition was presented, must be taken to be the governing one, it might happen, as indeed in this case it would happen, that the work would be forced upon a majority of the owners, treating all who did not sign the petition as opposed to its being undertaken by a majority made up in part of persons who, when action was taken, had ceased to have any interest in the matter.

No inconvenience results from the adoption of this construction of the Act, because the meeting provided for affords the means of ascertaining the wishes of the property owners

and the persons assessed as owners not being necessarily the actual owners, but being the only persons recognized in ascertaining whether the majority of the owners has petitioned, it would appear to me that the latest ascertainment of these owners is the one which the Legislature must have intended should be resorted to.

I come, therefore, to the conclusion that the roll of 1899 is the governing one.

The next question is as to the meaning of the words in parenthesis in sec. 3, "exclusive of farmers' sons not actual owners." Does this mean exclusive of farmers' sons who are not actual owners, in fact, or as shown by the last revised assessment roll?

The latter is, in my opinion, the meaning. It is, I think, in accordance with the grammatical construction of the section, and to adopt the opposite view would require that in determining as to whether a petition has been sufficiently signed, the council should enter into the often difficult question as to ownership, and for such an enquiry no adequate machinery, and indeed no machinery at all, is provided by the Act. The Legislature, in my opinion, did not intend that any such enquiry should be made, but did intend that the roll and it only should be looked at for the purpose of ascertaining who were to be counted as owners in determining whether the petition was sufficiently signed. There would be no certainty if this be not so, for if it were otherwise, though the council might determine in one way and proceed to pass its by-law on that basis, it would always be open to any one to re-open the question so determined and there would be no finality or security in proceeding with the work under the provisions of the Act.

By sec. 13, sub-sec. 4, of the Assessment Act (R. S. O. 1897 ch. 224), the assessor is required to set down in column 4 of his roll where a person assessed is within the meaning of the Municipal Act "a farmers' son" opposite to such person's name the letters "F. S." So that provision is made for it appearing by the roll itself that a farmer's son electing

to be assessed as joint owner is not an actual owner, but entered as such because of his election as a farmer's son to be so assessed under section 14.

But if the other construction be the correct one, I am of opinion that John R. Craven and George F. Craven are not "farmers' sons not actual owners." They are assessed as joint owners with their father, George Craven. They assume to be and were assessed as joint owners with their father and were not entered in the assessment roll as joint owners under section 14 of the Assessment Act. The arrangement between them and their father gave them, in my opinion, an interest in the land of a freehold nature entitling them to be assessed as they were assessed. I do not understand that the exception in question has any application to such a case, even assuming that they could not properly claim to be joint owners in fact, but it applies, in my opinion, only where a farmer's son has claimed the right under section 14 to be assessed as a joint owner by reason only of his being a farmer's son.

It was practically conceded that Malcolm A. McKellar and Archibald D. McKellar were not farmer's sons, as clearly they were not; the property in respect of which they were assessed not being a farm within the meaning of sec. 86, sub-sec. 2 of the Municipal Act, R. S. O. 1897 ch. 22.

It follows from these conclusions that a majority within the meaning of section 3 did not petition for the drainage work in question, it not being open to question that if the two Cravens (the sons) and the two McKellars are to be counted the petition was insufficiently signed.

The by-law is, therefore, in my opinion, invalid, and it must be so declared, and the defendants be enjoined from continuing or constructing the work through the plaintiff's lands.

The plaintiff claimed damages for the loss sustained by him from the cutting of timber on his lands on the line of the proposed drain through them. but the by-law not having been quashed I am bound by the construction placed upon

section 468 of the Municipal Act by the Court of Appeal for Ontario to hold that the action is not in that respect maintainable: *Hill vs. Middagh* and *Connor vs. Middagh* (9), *McCulloch vs. Township of Caledonia* (10).

As to costs, I think the plaintiff is entitled to the costs of the action as against both defendants. The defendant Oliver made common cause with his co-defendant in endeavouring to sustain the by-law, and I see no reason why he should be absolved from the usual consequence as to costs of an unsuccessful defence, though as between him and his co-defendant the latter ought, no doubt, to pay them.

Reversed by Court of Appeal. See next page.

(9) (1889) 16 A. R. 356.

(10) (1898) 25 A. R. 417.

## [IN THE COURT OF APPEAL.]

CHALLONER vs. TOWNSHIP OF LOBO.

Reported 1 O. L. R. 156.

*Drainage — Qualification of Petitioners — "Last Revised Assessment Roll."*

The "last revised assessment roll" which governs the status of petitioners in proceedings under the Drainage Act is the roll in force at the time the petition is adopted by the council and referred to the engineer for enquiry and report, and not the roll in force at the time the by-law is finally passed.  
Judgment of Meredith, C.J., 32 O. R. 247, reversed.

An appeal by the defendants from the judgment of Meredith, C.J., reported 32 O. R. 247, was argued before Armour, C.J.O., Osler, Moss, and Lister, J.J.A., on the 23rd of November, 1900. The facts are stated in the report below and in the judgments in this Court.

Talbot Macbeth, for the appellants.

T. G. Meredith, for the plaintiff.

A. Stuart, for the contractors.

1901. January 7. Armour, C.J.O.:—

The first question to be determined in this appeal is whether the last revised assessment roll for the year 1898, or the last revised assessment roll for the year 1899, is the roll which is to govern the proceedings taken under the petition which forms the basis of the proceedings.

The petition, which purports to be the petition of the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners) as shown by the last revised assessment roll to be the owners of the lands to be benefited, is dated on the 10th of April, 1899, and was presented to the council on the same day, and the council thereupon on the same day passed a resolution granting the

prayer of the petition and instructing the clerk to ask the township engineer to make plans, specifications, and detailed estimates of the drain work to be constructed, and report to the council.

At the date of the petition, of its presentation to the council, and of the instructions to the engineer, the last revised assessment roll was that of 1898.

The engineer made his report on the 26th of July, 1899, and it seems to have been assumed that at this date the assessment roll for the year 1899 had been finally revised.

The engineer's report was filed with the clerk of the municipality on the 31st of July, 1899, and he, on the 2nd of August, 1899, gave the notices required to be given by sec. 16 of the Municipal Drainage Act, naming therein the 14th of August, 1899, for the meeting of council at which the report of the engineer would be read and considered.

Sec. 17 of the Act R. S. O. 1897 ch. 226, provides: "The municipal council shall at the meeting mentioned in such notice, immediately after dealing with the minutes of its previous meeting, cause the report to be read by the clerk to all the ratepayers in attendance, and shall give an opportunity to any person who has signed the petition to withdraw from it by putting his withdrawal in writing, signing the same and filing it with the clerk, and shall also give those present who have not signed the petition an opportunity so to do; and should any of the roads of the municipality be assessed, the council may by resolution authorize the head or acting head of the municipality to sign the petition for the municipality, and such signature shall count as that of one person benefited in favour of the petition."

The municipal council held the meeting mentioned in the notice, and the report was read thereat to all the ratepayers in attendance, and any person who had signed the petition was given an opportunity to withdraw from it, and any person of those present who had not signed the petition was given an opportunity so to do, but it does not appear that any person who signed the petition withdrew from it, or that any person of those present who had not signed the petition did so.



The petition which any person who had not signed it was given an opportunity so to do, was the petition dated the 10th of April, 1899, which was presented to the council on that day, and the prayer of which was on that day granted, and in respect of which the engineer was instructed to make plans, specifications, and detailed estimates of the drainage work to be constructed, and to report to the council.

The date of the petition was not to be altered by reason of any person who had not signed it, then signing it, but it was to be signed dated as it was, and the person signing it so dated must have been at its date a person shown on the then last revised assessment roll to be an owner of land to be benefited in the area described in the petition, which then last revised assessment roll was the last revised assessment roll for the year 1898.

The said meeting of the municipal council was adjourned from the 14th of August, 1899, to the 21st of August, 1899.

Section 18 of the Act provides that "should the petition at the close of the said meeting of the council contain the names of the majority of the persons shown as aforesaid to be owners benefited within the area described, the council may proceed to adopt the report and pass a by-law authorizing the work, and no person having signed the petition shall, after the adoption of the report, be permitted to withdraw."

Persons who had signed the petition being allowed to withdraw from it, and persons who had not signed it being allowed to sign it, it became necessary to provide for then ascertaining whether the petition then contained the names of the majority shown as aforesaid, that is, by the last revised assessment roll referred to in the petition, being the last revised assessment roll for the year 1898, to be owners benefited within the area described.

I am of the opinion, therefore, that it must be held that the last revised assessment roll for the year 1898—the last revised assessment roll at the date of the petition, of its presentation, of the granting its prayer, and of the instructions

given to the engineer in compliance with it—governs all the proceedings taken under the petition.

The last revised assessment roll of 1898 was not put in evidence, nor was any evidence given that the petition did not contain the names of the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners) as shown by that roll to be the owners of the lands to be benefited in the area described in the petition.

The engineer attended the meeting of council on the 21st of August, 1899, and, before the adoption of his report, amended the assessment of certain lots by distributing the assessment according to the ownership of the several parts of the lots, the parties concerned being present, and he giving to them the amended assessment, and the next day sending to the clerk a letter containing such amended assessment, and the by-law was passed containing the engineer's assessment as so amended.

And I see nothing in this to vitiate the report or by-law.

The petition prayed for the drainage of a certain area, describing it, by means of (1) a drain or drains; (2) deepening, straightening, widening, clearing of obstructions, or otherwise improving the stream, creek, or watercourse known as Crow's Creek; (3) lowering the water of Crow's pond; following in these respects the form of petition given by the Drainage Act.

And it was objected that because all these means were not adopted for the drainage of the described area, the council had no power to authorize the undertaking of the work.

But the work to be done was the drainage of the described area, and it was for the engineer to determine the means by which it was to be done, and he determined that it was unnecessary to adopt all the suggested means of doing the work, and that it could be efficiently done without doing so.

And there is nothing in this objection.

It was also objected that at the time the work was commenced and also at the time this action was brought, no by-law had been passed by the appellants authorizing the execu-

tion by them of the contract with the defendant Oliver, nor was any contract in fact entered into by them with Oliver or properly executed by Oliver.

It appeared that the appellants had advertised for tenders for doing this drainage work, and that Oliver's tender had been accepted by resolution of the council, and that he had executed a contract with the appellants to do the work, which purported to be under seal, but was not sealed by Oliver.

Oliver, in doing the work, was acting under the authority of the appellants, and it does not concern the respondent that the appellants may not have been properly bound by contract with Oliver, but have only become so since the commencement of the action.

In my opinion the appeal must be allowed with costs, and the action dismissed with costs.

Osler, J.A. :—

One of the questions argued at the trial and on the appeal is, by what assessment roll the proceedings of the defendants on passing the by-law should have been governed—that of 1898 or that of 1899? Ought the majority of owners in the drainage area to be the majority as shown by the assessment roll which happened to be the last revised assessment roll at the time when the council was in a position to pass the provisional by-law, or the majority as ascertained by the roll in force when the petition for the drainage scheme was referred to the engineer to examine and report upon it and to make the necessary assessment therefor? It must be said that the provisions of the present Act are so framed as to make it difficult to form a positive opinion on the subject, but I have arrived at the conclusion that it was not the intention of the Legislature by the Drainage Act of 1894, R. S. O. 1897, ch. 226, to make any change in the former practice in this respect.

The council, on receiving a petition signed in the prescribed manner, i.e., by the majority in number of the resident and non-resident persons (exclusive of farmers' sons not

actual owners) as shown by the last revised assessment roll to be the owners of lands to be benefited in any described area, for the drainage of such area, are authorized to procure an engineer to make an examination of the area and to prepare a report, plans, specifications, and estimates of the work, and to make an assessment of the lands and roads within the area to be benefited, stating the proportion of the cost of the work to be paid by every road and lot or portion of lot for benefit, outlet, and relief from injuring liability: sec. 3 (1).

Then, how is the engineer to proceed in apportioning the assessment over this area? The Act gives no specific instructions on this point. His report, assuming that he does not find that other lands than those described in petition will be benefited or ought to be assessed, deals with the land in the drainage area and its sub-divisions alone. He does not assess or name in his report any individual owner. He must, nevertheless, acquire some knowledge of the various sub-divisions of the land in order to assess the parts belonging to different owners with their proper proportions, and as he must assess with reference to ownership this knowledge, as it appears to me, must be obtained from the assessment roll, where the status of the individual owners of the various parcels to be assessed is ascertained for the purpose of his proceedings. Section 6 provides that he need not confine his assessment to the part of the lot actually affected, but may place it on the quarter, the half, or the whole lot containing the part affected, if the owner of such part is also the owner of the lot or other said sub-divisions, but he has no authority to ascertain or to report that any one is an owner.

To ascertain who are the parties assessed, whether it be for the purpose of giving the notice required by section 9, sub-section 7, or the notice of the meeting provided for by section 16, at which the report will be read and considered by the council, which notices the clerk of the municipality is required to give when the engineer's report has been filed, the clerk must also refer to the assessment roll. That must be the roll on which the petition was based, on which the council

acted in determining to refer the matter to the engineer, and on which the latter must have acted on making up his report. Section 9, sub-section 7, speaks of notice to the "parties assessed," as also does section 16, but these parties appear by section 16 to be the "owners of every parcel of land assessed" within the described area, because none but owners can be assessed for the purpose, and the only means of identifying such owners and giving them the prescribed notice must be the roll on which the engineer has proceeded in making his report and on which they appear to be assessed as owners.

Sub-section 7 of section 9 is an amendment to the Drainage Act of 1894, and comes from 59 Vict. ch. 66, sec. 1 (O.). I hardly see what object was intended to be served by it, as the existing law, 57 Vict. ch. 56, sec. 16 (O.), had already provided more fully for giving notice of the report to the parties assessed.

Before the Drainage Act of 1894, from which sections 16, 17 and 18 of the present Act are derived, there would, I think, have been no room for argument that the "last revised assessment roll" which governed the proceedings throughout was not that upon which the council had acted when referring the petition to the engineer. These sections were directed to meet the difficulty which had not infrequently arisen, of parties who had signed the petition withdrawing their names therefrom and defeating it after all the expense involved in the examination and report had been incurred. They are now given a clear right to do so at a certain stage of the proceedings newly provided for, subject to indemnifying the council; and at that stage other persons who might have signed the petition are given the right to support it by adding their names thereto. But these persons must have been on the roll on which the proceedings were initiated. I think that is what is meant by "shown as aforesaid" in section 18. It cannot have been intended that there should be two "last revised assessment rolls," which would be the case if these new signatories were to be ascertained from a later roll than that on which the petition was based. If that were the roll

to be looked at, it would be the duty of the council to compare the petition and report with that roll, and to decline to pass any by-law if it should appear therefrom that the petition was not sufficiently signed, and thus to drop all the proceedings at that stage without remedy against anyone for any of the expenses they had been put to.

I can hardly conceive that such a result as this was contemplated or intended by the Legislature. On the whole, therefore, I think that the Act fairly admits of the construction that the roll which is to be regarded as the last revised assessment roll throughout is that which was the last revised assessment roll when the council took action upon the petition—in this case the roll of 1898. That must be taken to be the roll referred to in the by-law, and as the plaintiff made no attempt to prove, much less to impeach it, the by-law stands and defeats the action.

Moss, and Lister, JJ.A., concurred with Osler, J.A.

Appeal allowed.

## IN THE HIGH COURT OF JUSTICE.

TOWNSHIP OF TILBURY WEST vs. TOWNSHIP OF ROMNEY.

Reported 19 Prac. Rep. 242.

*Stay of Proceedings—Prior Action Pending—Parties.*

In this action the plaintiffs sought to recover from the defendants a large sum of money, being the portion assessed upon the defendants of the cost of certain drainage works constructed and paid for by the plaintiffs. In a previous action against the same defendants, the plaintiffs therein, who were land-owners in the defendants' township and assessed for a portion of the sum now sued for, sought a declaration that the defendants' by-laws purporting to impose this assessment upon the plaintiffs therein, and all the proceedings upon which they were founded, were void, and an injunction to restrain any proceedings for the collection of the amount for which the plaintiffs therein were assessed. In that action judgment had been given in the defendants' favour, but the plaintiffs had an appeal to the Supreme Court of Canada pending when the present action was brought:—

Held, that the present action should not be stayed until after the determination of the appeal in the other.

September 15, 1900.—Divisional Court.

This was an appeal by the plaintiffs from an order of Rose, J., in Chambers, on the 11th June, 1900, dismissing an appeal by the plaintiffs from an order of the local Judge of the High Court at Chatham, directing that the proceedings in this action be stayed until ten days after the determination of an appeal pending in the Supreme Court of Canada in a certain action wherein the Sutherland-Innes Company, Limited, were plaintiffs and the defendants the corporation of the township of Romney were defendants.

The present action was brought by the corporation of the township of Tilbury West to recover from the corporation of the township of Romney the sum of \$7,748.20 and interest from the 17th July, 1897, being the portion assessed upon the defendants of the cost of certain drainage works constructed and paid for by the plaintiffs.

The grounds upon which the order to stay proceedings in this action was made were that the questions likely to arise in it were the same as those arising in another action in which

the Sutherland-Innes Company were plaintiffs, and these defendants were defendants. The Sutherland-Innes Company were the owners of a large tract of land in the township of Romney assessed for a portion of the \$7,748.20 now sued for, and their action was brought for a declaration that the by-laws of the council of Romney purporting to impose this assessment upon them, and all the proceedings upon which they were founded, were void, and for an injunction to restrain any further proceedings for the collection of the sum assessed. Judgment had been given in the defendants' favour in the Courts of this Province, and the plaintiffs in that action had appealed to the Supreme Court, where their appeal was still pending. The defendants had, therefore, successfully upheld the validity of the by-laws and assessment so far, but they had refused to pay over to the plaintiffs the sum assessed against them as a township, lest the pending appeal in the Supreme Court should be determined adversely to them. The plaintiffs in the present action on the other hand, insisted that the sum for which the action was brought had been due them for several years, and that they were not bound to await the result of the appeal in the other action, which, even if adverse to the defendants, would not affect the present action or their right to prosecute it.

The local Judge of the High Court at Chatham, upon the application of the defendants, made an order staying the proceedings in the present action until ten days after the determination of the pending appeal in the Supreme Court in the other action, and Rose, J., upon appeal to him affirmed the order.

The plaintiffs then appealed to a Divisional Court, and the appeal was argued on the 10th September, 1900, before Falconbridge, C.J., and Street, J.

DuVernet, for the plaintiffs.

Aylesworth, Q.C., for the defendants.



On the 15th September, 1900, the judgment of the Court was delivered by

Street, J. :—

The plaintiffs claim a debt due them by the defendants as they allege, and which if due has been owing them for some years. Their action has been stayed because of the pendency of some litigation between the defendants and certain third parties who deny the existence of any debt from the defendants to the plaintiffs. The defendants say that if that litigation be determined in their favour they will pay the plaintiffs' claim, otherwise they will not; and at their request the present action has been stayed by the order now appealed against until the result of the other litigation be known.

It is plain that the present plaintiffs will not in any way be bound by the result of the other action, to which they are in no way parties, and that, however that action may result, they will still be entitled to prosecute their own action. It is said that, although this is no doubt technically true, yet, their rights will for all practical purposes be determined by the result of the other case. That, however, by no means follows, for the present plaintiffs may place both the facts and the law before the Court in a different light from that shed upon it by the Sutherland-Innes Company, the plaintiffs in the other case, and by doing so may succeed even should those plaintiffs fail. The plaintiffs in bringing the present action are pursuing an undoubted right; they are doing nothing of a vexatious character, and, in my opinion, they should not be hindered in the prosecution of their action: see *Higgins vs. Woodhall* (1), *Sharp vs. McHenry* (2), *Fawkes vs. Griffin* (3), *Great North-West Central R. W. Co. vs. Stevens* (4).

The appeal should, therefore, be allowed, and the order of the local Judge should be set aside, with costs here and below.

(1) (1889) 6 Times L. R. 1.

(2) (1886) 55 L. T. N. S. 747.

(3) (1897) 17 P. R. 473.

(4) (1899) 18 P. R. 392.

COURT OF APPEAL, ONTARIO.

WILLIAM RANNEY VS. CORNELIUS CROWLEY, JAMES McDONALD AND THE TOWNSHIP OF ELMA.

*Change of Engineer—Location of Drain—Stakes on Ground—Evidence of Intention.*

It is not necessary that a drainage work be under the supervision of the engineer who draws the plans and specifications and makes the report; the work may be carried out under the direction of any competent person whom the municipality may choose to employ. The intention of the engineer as to the location of the drain must be ascertained from the plans, profiles, specifications, report and the stakes planted by the surveyor, and such intention except in as far as it may be gathered from such data can not be ascertained or received as evidence.

The words "along lot lines 33-34" appearing on the profile construed as indicating the locality and not as defining the location of the drain.

The action was brought in the High Court of Justice complaining that in the construction of a drain under the authority of a by-law of the defendant township, the defendants, Crowley and McDonald, the contractors, were locating the portion of the drain to be constructed along the line between lots 33 and 34 wholly upon lot 34, owned by the plaintiff, and not on the line between the lots taking half the width of the drain from each lot; and claiming an injunction, etc.

The facts sufficiently appear in the judgment.

The appeal was argued on the 29th of March, 1901, before Armour, C.J.O., Osler, MacLennan, Moss and Lister, J.J.A.

Mr. Mabee, K.C., for the plaintiff

Mr. H. B. Morphy, for the defendants.

The judgment of the Court was delivered on the 24th of June, 1901, by

Armour, C.J.O.:—

The drain in respect of the location of which the plaintiff, the owner of lot number 34 in the 16th concession of the

township of Elma, complains, was constructed under the assumed authority of a by-law of the township of Elma, provisionally adopted on the 15th day of October, 1898, and finally passed on the 22nd day of April, 1899, founded upon the report of one W. F. Vanbuskirk, the engineer of the said township, made in pursuance of the provisions of the Drainage Act, 1894, and bearing date the 29th day of July, 1896.

The description of the drain, the location of a part of which is in dispute, is contained in clause 3 of his report, and is as follows: "That the drain on lots 32 and 33, in the 16th concession, the road between the 15th and 16th concessions, the road between lots 30 and 31, and lots No. 30 in the 15th concession of the township of Elma, hereinafter called Boyle drain branch No. 1, be enlarged, improved and extended up stream to the line between lots Nos. 34 and 35, at its intersection with the line between the 16th and 17th concessions; and down stream to the main drain, at its intersection with the line between lots Nos. 27 and 28, in the 14th concession of the township of Elma, as shown in red on the accompanying plan, and as staked upon the ground."

The part of this drain, the location of which is in dispute, lies between "the drain on lots 32 and 33 in the 16th concession," and "the line between lots Nos. 34 and 35, at its intersection with the line between the 16th and 17th concessions."

He states in his report: "The location of drains, points of commencement and outlet limits of watersheds, etc., etc., are clearly shown on the plans accompanying this report, and can be more readily understood from them than by a description in writing." "I have staked out the drains on the ground, taken levels, etc., and have figured upon the accompanying plans and profiles, the lengths, widths and directions, and the depths from surface of ground and bottom of existing drains which I propose having drains made. The accompanying specifications explain in detail the manner in which the work will be executed."

"The earth excavated from drains will be cast on the lands on either side of cut, except where damage would be

done to fences, when it will be cast to the side of drain away from fences."

The specification of works to be done in excavating Boyle drain and branches, which accompanied his report, stated that the work contemplated comprised among other works: "Section No. 2. The excavation of a drain, hereinafter known as branch No. 1, Boyle drain, from stake No. 30 of main drain, planted in the line, between lots 27 and 28, in the 14th concession of the township of Elma; across lots Nos. 28, in the 14th concession, lots Nos. 28, 29 and 30, in the 15th concession, along the side road between lots 30 and 31, along the road between the 15th and 16th concessions, across lots 32, 33, 34, in the 16th concession, to stake marked 150 x 56, planted on the line between lots 34 and 35 at the blind line between the 16th and 17th concessions of the township of Elma."

On the plan which accompanied his report, stake marked 150 x 56, appears to be planted on the line between lots 35 and 36 at the blind line, and not between lots 34 and 35, as stated in the specifications.

This specification also stated that "the contractor shall excavate the new drains, and shall deepen and widen the existing drains to the depths and widths, etc., marked on the accompanying profiles. The locations of drains, etc., are marked by continuous red lines on the accompanying plans; and are staked on the ground, and no divergence from stakes on ground will be allowed or paid for, unless a written order for change in location is given by engineer in charge of work."

That "care shall be taken that no fences or portions of fences are covered with earth, or destroyed in any way whatever."

That "the contractor will be held responsible that all stakes, brush-marks, etc., are not removed or destroyed during the progress of the work, unless absolutely necessary, by reason of their being in the way of excavation. Stakes have been planted along the lines of drains, at intervals of 100 feet, and are numbered in red, corresponding to those shown on profiles, plans, etc. Depths of cuttings at each stake are

shown on profiles. All depths are to be measured from the surface of ground, at foot of stake. All depths are figured in feet and tenths, not in inches."

In the profiles of Boyle drain and branches, which accompanied his report, that part of them which includes the drain, the location of which the plaintiff disputes, has superscribed the words, "along lot line 33-34."

In the plans which accompanied his report, three of which were put in evidence, red lines appeared, indicating the drains.

Stakes had been planted by the engineer along the line of the drains before he made his report, and afterwards, in the month of June, 1899, he went over the line replacing any of those stakes which had been removed, placing the new stakes as nearly as possible where the old ones stood.

On the 10th April, 1900, the engineer left the Province of Ontario, and went to British Columbia to reside, and on the 7th of May, 1900, the township council of the township of Elma passed a by-law, repealing their by-law, appointing Mr. Vanbuskirk engineer, and on the same day passed a by-law, appointing John Roger, O.L.S., their engineer, for the inspecting the work done by the contractors, giving estimates as the work progressed, and doing all necessary work otherwise required, and finally passing the contract when completed on the municipal drain, known as the Boyle drain, and the improving of the River Maitland.

The defendants thereupon proceeded to construct the drain upon lot 34 in the 16th concession, according to the stakes planted by Vanbuskirk, the engineer, and on the east side thereof, when the plaintiff, contending that the drain should be constructed upon the division line between lots 33 and 34, and equally upon each lot, commenced this action to restrain the construction of the said drain so commenced to be constructed, and obtained an interim injunction, which, not having been continued, the defendants proceeded and completed the said drain according to the said stakes, and on the east side thereof; spreading the excavated earth on the east

side of the drain so constructed, and in the manner provided for by the engineer's report.

The cause was tried at Stratford, on the 4th of December, 1900, by Rose, J.

Evidence was given by engineers called for each side of their opinion as to where the drain should be located, and evidence was given by the engineer, Vanbuskirk, as to his intention regarding its location.

The learned Judge dismissed the action with costs, delivering the following judgment, on the 13th of December, 1900.

Rose, J.:—

I see nothing in the Municipal Drainage Act, ch. 226, R. S. O. 1897, requiring the municipality to employ the surveyor who draws the plans and specifications and makes the report, to supervise the work. When he has made his report, and it has been adopted and the by-law passed, I see no reason whatever why the municipality should not have the work carried out under the direction of any competent man whom they choose to employ.

There is nothing, therefore, in the objection that there was a change of engineer. No doubt this has caused the trouble, for had Mr. Vanbuskirk remained he would have understood his own work, and have given such directions as would have prevented misunderstanding, although probably it would not have prevented objections.

I think the duty devolves upon the Court to ascertain from the plans, profiles, specifications, report and the stakes planted by the surveyor, what was the line of drain determined upon by the municipality, and that the intention of the engineer, except in as far as it may be gathered from such data, cannot be ascertained or received as evidence.

The plan certainly does not, in my opinion, by itself show that the drain was to be dug upon the dividing line between lots 33 and 34 in the 16th concession. Even at the risk of reading the plan differently from some of the experts, I think that it appears to locate the drain on the east side of

such line. Looking at the specifications, there is nothing to show that the drain was to be on the line. They state that the drain shall go "across lots 32, 33, and 34, in the 16th concession to stake marked '150 x 56' planted on the line between lots 34 and 35 at the blind line between the 16th and 17th concessions of the township of Elma."

This language would indicate that the drain was to go across lot 34 as it crosses lots 32 and 33.

There is nothing in the profile, as far as I can understand, it, to show that the drain is to be situated on the line.

The words "along lot line 33-34" are at best for the plaintiff, ambiguous. They certainly do not necessarily mean on the line. It may be that had the plans and specifications shown that the drain was on the line, no engineer or surveyor would be misled by the use of the word "along," instead of "on," but the use of it is as consistent with the drain going alongside the line as with it going on the line.

There remain the stakes planted to show the line of the drain, and I find in the report that the drain is to be "as shown in red on the accompanying plan, and as staked upon the ground." And in the specifications it is said, "the location of drains, etc., are marked by continuous red lines on the accompanying plans, and are staked in the ground, and no divergence from stakes on ground will be allowed or paid for, unless a written order for change of location is given by the engineer in charge of the work."

I think it is reasonably clear that the stakes upon the ground indicated a drain to the east of the dividing line, and I cannot say that the engineer in charge drew an erroneous conclusion from the plans and specifications, profiles and stakes in locating the drain where he did locate it. Other engineers might have come to a different conclusion, and from the evidence, it may be said that some of the witnesses for the defence would have formed a different opinion.

To find for the plaintiff requires a finding that the construction was an erroneous one, and not that which might fairly be placed upon the plans, etc.

In my opinion, the plaintiff has failed to show that the work on the ground is not in accordance with the report adopted by the council, and the work authorized to be done.

The action must be dismissed with costs.

The plaintiff appealed.

The whole contention of the plaintiff was, that the drain should have been dug upon the dividing line between lots 33 and 34, and equally upon each lot instead of as it was, according to the stakes planted by engineer Vanbuskirk, and referred to in his report, and is wholly upon lot 34, the plaintiff's land.

This contention cannot prevail, for, in my opinion, the location of the drain must have been determined by the work on the ground by the stakes planted by the engineer, Vanbuskirk, and referred to by him in his report, and was not otherwise determinable.

It was the work on the ground, the stakes planted by the engineer, which alone show the owners of the lands through which the drain was to be constructed, and those employed to construct it, its proper location.

The engineer in his report, embodied in the by-law, described the drain as "shown in red upon the accompanying plan, and as staked upon the ground," and he further stated therein, that he had staked out the drains on the ground, taken levels, etc., and had figured upon the accompanying plans and profiles, the lengths, widths and directions, and the depths from surface of ground and bottom of existing drains where he proposed having drains made, and that the accompanying specifications explained in detail the manner in which the work would be executed.

That the drain could not have been located from the plans alone is abundantly shown by the evidence.

The red lines were drawn on the plans in a free hand with a ruling pen. The plans were drawn on a scale of fifty chains to one inch, and the red lines were drawn without any attempt at strict accuracy, and strict accuracy would have been impossible on plans of that scale; and comparing the



three plans produced, the red lines on no two of them coincide as to the location of the drain.

A good deal of stress was laid upon the profile with the words superscribed, "along lot line 33-34" as showing that the drain was to be constructed according to the plaintiff's contention, but these words were plainly used as indicating the locality, and not as defining the location of the drain; for the levels and measurements were all taken and made at the stakes, and were applicable only to the line of stakes, and not the line between lots 33 and 34, and this is proved by the statement in the specifications that "the contractor shall excavate the new drains, and shall deepen and widen the existing drains to the depths and widths, etc. Marked on the accompanying profiles, depths of cuttings at each stake are shown on profiles."

Recourse must, therefore, have been had by those constructing the drain to the stakes planted by the engineer as defining the proper location of the drain, and the specifications show that "the locations of drains, etc., are marked by continuous red lines on the accompanying plans, and are staked on the ground, and no divergence from stakes on ground will be allowed or paid for, unless a written order for change in location is given by engineer in charge of work."

The defendants, therefore, in constructing the drain as they did, and in disposing of the excavated earth as they did, were, in my opinion, justified by the by-law, and this appeal must be dismissed with costs.

[IN THE COURT OF APPEAL.]

TOWNSHIP OF ELIZABETHTOWN vs. TOWNSHIP OF AUGUSTA.

Reported 2 O. L. R. 4.

*Drainage—Artificial Obstruction—Failure of Scheme—New Report without Examination.*

A dam in a stream in the defendant township had the effect of penning back the water in and of preventing logs and other obstructions from making their way down the portion of the stream in the plaintiff township. The plaintiff township initiated a scheme under the drainage clauses of the Consolidated Municipal Act, 1883, for the removal of the dam and other obstructions, and an engineer made the necessary examination and report in due form, but this scheme was set aside as unauthorized by the Act. After the amendment in 1886 of the drainage clauses by the addition of sub-secs. 18, 19 and 20 to sec. 570, the plaintiff township again initiated the scheme and referred it to the same engineer, who, without any further examination, re-wrote his report and adopted his previous estimates and assessments. Notice was served in due course upon the defendant township and there was no appeal, and the plaintiff township did the work and brought this action for payment of the proportion of the cost assessed against the defendant township:—

Held, that the scheme was authorized by the amending sections, but, per Osler, and Lister, J.J.A., that the report of the engineer was invalid and the scheme not binding. Armour, C.J.O., and Moss, J.A., taking the contrary view.

In the result the judgment of Street, J., in favour of the defendants, was affirmed.

An appeal by the plaintiffs from the judgment at the trial was argued before Armour, C.J.O., Osler, Moss, and Lister, J.J.A., on the 29th of January, 1901. The facts are stated in the judgments, and the line of argument is there indicated.

Watson, K.C., and H. C. Osborne, for the appellants.

J. A. Hutcheson, for the respondents.

1901. May 14. Armour, C.J.O.:—

Mud Creek flows from Mud Lake, in the township of Elizabethtown, in an easterly direction through lots 28 to 14 inclusive, and through part of lot 13 in the 8th concession of the said township, and thence through part of lot 13 and through lots 12 to lot A. inclusive in the 9th concession of

the said township, and thence across the town line between the townships of Elizabethtown and Augusta, thence through lot 37 in the 9th concession of Augusta and across the concession line between the 8th and 9th concessions, and thence through part of lot 37 and through lot 36 in the 8th concession of the said last mentioned township, on which last mentioned lot was a mill-dam owned by one Bellamy, which penned back the waters of the said creek and caused them to overflow a large quantity of land in the said townships.

Negotiations were had with the said Bellamy for the removal of the said dam, who agreed to do so for the sum of \$5,000.

In 1884 a petition having been presented to the council of Elizabethtown for the removal of obstructions, the principal of which was the said dam, which prevented the free flow of the waters of the said creek, the council acting in accordance, as they thought, with the law as it then was, the Consolidated Municipal Act, 1883, sec. 570, procured one Willis Chipman, an engineer, to make an examination of the creek from which it was proposed to remove obstructions, and procured plans and estimates to be made of the work by such engineer, and an assessment to be made by him of the real property to be benefited by such work, stating as nearly as might be in his opinion the proportion of benefit to be derived therefrom by every road and lot or portion of lot. Thereafter, in April, 1885, the said engineer made his report to the council of Elizabethtown with the said plans and estimates and the assessment made by him, and the council of Elizabethtown thereupon passed a by-law for the aforesaid purpose, and having served the council of the township of Augusta with a copy of the report, plans, specifications, assessment, and estimates of the said engineer, the last mentioned council appealed, and the arbitrators appointed determined that the law did not apply to the removal of an artificial obstruction such as the dam above mentioned, and so the proceedings became abortive.

And in order to remedy this difficulty, the Municipal Amendment Act, 1886, sec. 22, was passed amending sec. 570

of the Consolidated Municipal Act, 1883, by adding thereto sub-secs. 18, 19 and 20 therein set forth.

Thereafter, on the 6th September, 1886, a petition was presented to the council of Elizabethtown purporting to be of a majority of the persons shown by the last revised assessment roll to be the owners of the property to be benefited by the work therein mentioned, setting forth that a stream, known as Mud Creek, running through the township of Elizabethtown and from thence to the township of Augusta in the county of Grenville, was obstructed by a certain dam belonging to one John B. Bellamy, erected on lot number 36 in the 8th concession of the said township of Augusta, then known as Bellamy's mill dam, and by other obstructions, which said dam and obstructions prevented the free flow of the waters of the said creek. That the said John B. Bellamy had agreed, in consideration of the sum of five thousand dollars, to take down and remove said dam. That the taking down and removal of said dam and of the other obstructions in said creek from said dam to the east side line of lot number 30 in the 8th concession of the said township of Elizabethtown would benefit a large tract of land, to wit, lots numbers 5 to 29 inclusive in the 8th concession of the said township of Elizabethtown and lots numbers 1 to 16 inclusive in the 9th concession of the said township of Elizabethtown, and lots 37 to 33 inclusive in the 8th and 9th concessions of the said township of Augusta. And the petitioners prayed that said mill-dam and other obstructions in said creek might be removed (said mill dam being removed by carrying out and completing said proposed arrangement with said John B. Bellamy) from the said dam of the said John B. Bellamy up to the east side line of lot number 30 in the 8th concession of said township of Elizabethtown. And that for that purpose all proper steps might be taken in pursuance of the Municipal Act and the sections thereof relating to drainage and all proper by-laws passed and surveys made.

It was admitted that the last revised assessment roll of the township of Elizabethtown at the time of the presentation of this petition was that of the year 1886, and that this

petition was signed by a majority in number of the persons shown by that roll to be the owners whether resident or non-resident of the property to be benefited in the township of Elizabethtown.

The owners to be benefited in the township of Augusta were not taken into account.

The council of Elizabethtown thereupon instructed the said Chipman to make an examination of the creek from which it was proposed to remove the said obstructions, and procured plans and estimates to be made of the work by him and an assessment to be made by him of the real property to be benefited by such work, stating as nearly as might be in his opinion the proportion of benefit to be derived therefrom by every road and lot or portion of lot.

Chipman did not proceed under these instructions to make another examination of the creek and fresh plans and estimates and a new assessment, but on the 19th May, 1887, made a new report, accompanying it with the plans, estimates, and assessment he had previously made, and dating them as he dated the report. This report shewed \$4,986 to be assessable against lands and roads in Elizabethtown, and \$764 against lands and roads in Augusta.

The council of Elizabethtown thereupon passed the prescribed by-law in due form, and on the 20th July, 1887, the council of the township of Elizabethtown served the head of the council of the township of Augusta with a copy of the report, plans, specifications, assessment, and estimates of the said engineer, which were not appealed from.

The council of the township of Augusta never passed any by-law, as required by sec. 581 of the said Act, for raising the sum named in the report as assessable against the real property in that township benefited by the said work, nor did they pay over the same or any part thereof to the township of Elizabethtown. And the council of the township of Elizabethtown having paid the whole cost of the work, seeks in this action to recover against the defendants the sum named in the report as assessable against the lands and roads in the township of Augusta.

The action was tried before Street, J., at Brockville on the 14th June, 1900, who dismissed the action with costs.

The plaintiffs appealed.

The first objection raised to the plaintiffs' recovery was that there was no jurisdiction in the council of the township of Elizabethtown to take the proceedings and pass the by-law they did, for the petition was signed only by a majority in number of the persons as shown by the last revised assessment roll of that township to be the owners, whether resident or non-resident, of the property to be benefited in that township, and was not signed by a majority in number of the persons as shown by the last revised assessment roll of the township of Augusta to be the owners, whether resident or non-resident, of the property to be benefited in the latter township, and the principal obstruction for the removal of which the petition was presented being the dam which was situate in the adjoining township of Augusta, wholly beyond the limits of the township of Elizabethtown.

The question here raised is a new one by reason of the special provisions respecting obstructions contained in sec. 569 of R. S. O. 1887 ch. 184, which I refer to as containing the law which governed the proceedings here in controversy, and none of the cases hitherto decided can be invoked as conclusively determining it.

Sec. 569 provides for the petition to the council "for the removal of any obstruction which prevents the free flow of the waters of any stream, creek or watercourse."

Sub-sec. 18 provides that "where any obstruction within the meaning of the provisions of this section is wholly situate or existing beyond the limits of the municipality, the same shall for all purposes and with respect to every provision of this Act be deemed and taken to be an obstruction situate and existing partly within and partly without the limits of the municipality, and as if the proposed work or operations in connection therewith or with the removal thereof were to be done and performed in part within the limits of the municipality and in part to be continued and extended beyond such

limits, and all the provisions of this Act shall be held and deemed to apply and operate accordingly."

Sub-sec. 19 provides that "where such obstruction is occasioned by or is a dam or other artificial structure, the council shall be deemed to have full power to acquire, with the consent of the owner thereof and upon payment of such purchase money as may be mutually agreed upon, the right and title to remove the same wholly or in part, and any amount so paid or payable as purchase money shall be deemed part of the cost of the works under this section in connection with the removal of such obstruction, and shall be dealt with and provided for accordingly."

Sub-sec. 20 provides that "the two preceding sub-sections are to be taken as applying only to cases where the obstruction is actually situate or existing in a municipality next adjoining to the municipality mentioned in such sub-sections."

The evidence showed that the dam was really the only obstruction in the creek, for it was shown that if the dam were removed, all the other obstructions would pass down the creek with the free flow of the water.

This dam was therefore an obstruction within the meaning of the provisions of sec. 569, wholly situate beyond the limits of the township of Elizabethtown, and for all purposes and with respect to every provision of the Act was to be deemed and taken to be an obstruction situate and existing partly within and partly without the limits of the township of Elizabethtown, and as if the proposed work or operations in connection therewith or with the removal thereof were to be done and performed in part within the limits of that municipality and in part to be continued beyond such limits.

And the object of sub-sec. 18 was, as applied to this case, to provide that, inasmuch as the township of Elizabethtown had power to remove any obstruction which prevented the free flow of the waters of the creek within its limits, and to continue such work beyond its limits and into the adjoining township of Augusta, under the provisions of sec. 575, this dam, though wholly in the township of Augusta, should be deemed and taken to be an obstruction situate and existing

partly within and partly without the limits of the township of Elizabethtown, and as if the removal thereof was to be performed in part within the limits of the township of Elizabethtown and in part to be continued and extended beyond such limits and into the adjoining township of Augusta, as provided by sec. 575.

If, however, those are to be taken to be obstructions in the creek which would, the dam being removed, pass down the creek with the free flow of the water, and were within the limits of the township of Elizabethtown, that township had authority to remove such obstructions and to continue such removal into the township of Augusta under sec. 575, the township of Elizabethtown having the power to acquire the said dam under sub-sec. 19.

I am of the opinion, therefore, that what the township of Elizabethtown did it had the power to do upon the petition presented to its council, and that such petition was sufficiently signed for the purpose, and that it was not necessary that it should be signed by any of the owners of property to be benefited in the township of Augusta.

The next objection taken was that the engineer did not, after the petition was presented in September, 1886, make a new examination of the lands, merely changing the date on his plan and drawing a new report containing the same assessment as his former report did.

The engineer had already examined the lands, and assessed those lands that would be benefited by the proposed work, and it was not suggested that any change had taken place from the time he had examined and assessed them up to the time that he made his new report, and it is difficult to imagine how there could have been any change; but a copy of his report, plans, specifications, assessment and estimates was served upon the head of the council of the township of Augusta, and not having been appealed from, became binding on such council under sec. 579.

It was next objected that the sum mentioned in the report as assessed against lands and roads in the township of



Augusta could not be recovered, that if there was any remedy it was only by mandamus, and that the Court would not grant this writ after such a lapse of time.

The only parts of the statute bearing upon this objection are contained in sub-sec. 2 of sec. 569, which provides for the "borrowing on the credit of the municipality the funds necessary for the work, although the same extends beyond the limits of the municipality (subject in that case to be reimbursed as hereinafter mentioned)." And in sec. 580, to which the words "subject in that case to be reimbursed as hereinafter mentioned" refer, which provides that "the council of such last mentioned municipality shall within four months from the delivery to the head of the corporation of the report of the engineer or surveyor, as provided in the next preceding section, pass a by-law or by-laws to raise such sum as may be named in the report, or, in case of an appeal, for such sum as may be determined by the arbitrators, in the same manner and with such other provisions as would have been proper if a majority of the owners of the lands to be taxed had petitioned as provided in sec. 569 of this Act."

These provisions created, in my opinion, a statutory obligation on the part of the defendants to raise and pay over to the plaintiffs the sum named in the report.

In *Anonymous* (1704), 6 Mod. 27, Holt, C.J., said: "Wherever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right but no remedy but in equity." See also *Hopkins vs. Mayor of Swansea* (1), *Goody vs. Penny* (2), *Weale vs. West Middlesex Waterworks Co.* (3).

In *Shepherd vs. Hills* (4), the action was for rates and duties imposed by 32 Geo. III. ch. 74, and Parke, B., said:

(1) (1839), 4 M. & W. 621; S. C. (1841), 8 M. & W. 901.

(2) (1842) 9 M. & W. 687.

(3) (1820) 1 Jac. & W. 358.

(4) (1855) 11 Exch. 55.

“There is no doubt that wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary.”

The only other objection taken was that the plaintiffs' claim was barred by the Statute of Limitations. But being a statutory obligation, it required twenty years to bar it: *Cork and Bandon Railway vs. Goode* (5), *Shepherd vs. Hills* (6).

The appeal should therefore be allowed with costs, and judgment should be entered for the plaintiffs for the sum of \$764 with interest from the 20th day of November, 1888, and full costs of suit.

Osler, J.A.:—

I think, for the reasons given by my brother Lister, whose judgment I have had an opportunity of reading, that the appeal should be dismissed.

Moss, J.A.:—

I understand my brother Lister to be of the opinion that the plaintiffs would be entitl to judgment in this action, but for the objection that the engineer, Mr. Willis Chipman, did not make an examination of Mud Creek and the real property to be affected by the work provided for by by-law No. 308, after the receipt of the last petition therefor, but instead made his plans, estimates, assessment and report upon knowledge derived from a previous examination made for the purpose of preparing plans and estimates and making an assessment and report.

This objection was not raised in the statement of defence, and was first urged in answer to the appeal in this Court, and we have not the benefit of the opinion of the learned trial Judge upon the point.

The engineer had been appointed and instructed by the council of Elizabethtown on a former occasion to make an examination and prepare plans and make an assessment for a

precisely similar scheme. He had then made an actual examination, prepared plans, and made an assessment, and reported them to the council.

The scheme was set aside on the ground that it was not authorized by the drainage provisions of the Municipal Act as they then existed. In consequence of this, further legislation was had to enable the scheme to be carried out, and the petition for the scheme now in question was presented, and acted upon by the council again appointing the same engineer. He possessed all the information and knowledge requisite to enable him to prepare plans and estimates and make an assessment, and instead of going over again the area, which had not in the meantime changed in condition, he adopted his former plans, estimates, and assessments, and made his report to the council. That body acted upon the report without, so far as is shown, being aware that the engineer had not actually gone over the ground again with a view to its preparation.

Sec. 570 of the Municipal Act of 1883, under which the proceedings were taken, provides "that the council may procure an engineer or provincial land surveyor to make an examination of the stream, creek, etc., . . . and may procure plans and estimates to be made of the work by such engineer or surveyor, and an assessment to be made by such engineer or surveyor of the real property to be benefited by such work."

The council did procure an engineer for these purposes by appointing Mr. Chipman, a competent engineer, to perform these duties. And the statement in his report that he had made an examination and an instrumental survey of the creek was in accordance with the facts. I think that, under the circumstances, there was an actual assessment made by the engineer. I do not understand that in order to make the assessment valid the engineer must be actually on the ground when he puts down the figures. The object of an examination is to obtain the information necessary to enable him to arrive at the proper figures. Having gained that information, he proceeds to make his computations and apportion the amount

according to the proportion of benefit to be derived therefrom, and the assessment thus made is embodied in his report. In this instance, the engineer having obtained the information in the course of the previous employment, and the knowledge so gained being precisely what was needed for this occasion, made his assessment upon that knowledge.

The assessment so made was not an illusory or mere formal proceeding. It was an actual exercise of judgment founded upon information and knowledge. And the fact that the engineer was able to do that without making another visit to the creek or a formal traverse of the area, should not at all detract from its effect. I think it should be regarded as an assessment in fact which bound the properties affected, unless set aside or varied on appeal, in accordance with the provisions of the statute. Every subsequent proceeding was duly taken by the plaintiffs as required by the statute. The head of the defendants' council was duly and properly served with copies, and no appeal was taken. The work was proceeded with, and the lands in the defendant municipality which were assessed have received the benefit thereof. I do not think it should now be deemed open to the defendants to question the propriety of the engineer's work. There having been no appeal, the proceedings ought to be held binding upon the defendants, as enacted by sec. 580 of the Municipal Act of 1883, and should be upheld as against them in this action.

Lister, J.A.:—I think the plaintiffs' right to recover in this action depends upon whether there was an assessment within the meaning of the Consolidated Municipal Act, 1883, the Act in force at the time the proceedings in question were had.

The portions of the 570th section of this Act material to this enquiry read as follows: "In case the majority in number of the persons as shown by the last revised assessment roll to be the owners . . . of the property to be benefited in any part of any township . . . petition the council for . . . the removal of any obstruction which prevents the free flow of the waters of any stream, creek or water-

course . . . the council may procure an engineer or surveyor to make an examination of the stream, creek or water-course . . . from which it is proposed to remove obstructions . . . and may procure plans and estimates of the work by such engineer or surveyor, and an assessment to be made by such engineer or surveyor of the real property to be benefited by such work . . . and if the council is of opinion that the proposed work or a portion thereof would be desirable, the council may pass by-laws (1) for providing for the proposed work or a portion thereof being done, as the case may be; (2) for borrowing on the credit of the municipality the funds necessary for the work, although the same extends beyond the limits of the municipality, subject in that case to be reimbursed as hereinafter mentioned."

Sec. 580 provides that "The council of the municipality in which the deepening or drainage is to be commenced shall serve the head of the council of the municipality into which the same is to be continued . . . with a copy of the report, plans, specifications, assessment and estimates of the engineer or surveyor aforesaid, and unless the same is appealed from as hereinafter provided, it shall be binding on the council of such municipality."

And sec. 581 of the Act provides that "The council of such last mentioned municipality shall within four months from the delivery to the head of the corporation of the report of the engineer or surveyor, as provided in the preceding section, pass a by-law or by-laws to raise such sum as may be named in the report, or in case of an appeal for such sum as may be determined by the arbitrators, in the same manner and with such other provisions as would have been proper if a majority of the owners of the lands to be taxed had petitioned as provided in sec. 570 of this Act."

The provisions in relation to the appeal referred to in sec. 580 are contained in sec. 582 of the Act, and, so far as material, are as follows: "The council of the municipality into which the work is to be continued . . . may within twenty days from the day on which the report was served appeal therefrom, in which case they shall serve the head of

the corporation from which they received the report with a written notice of appeal; such notice shall state the ground of appeal, the name of an engineer or other person as their arbitrator, and shall call upon such corporation to appoint an arbitrator in the matter on their behalf within ten days after the service of such notice."

It is not in dispute that what purported to be a copy of the engineer's report, plans, specifications, assessment and estimates was served on the head of the council of the defendant municipality, and that the defendants did not appeal therefrom; nor is it in dispute that after presentation to the plaintiffs of the petition praying for the doing of the work in question, the engineer made no examination of the creek in which such work was to be done, nor did he make plans and estimates of the work nor an assessment of the real property to be benefited thereby. What he did was to re-write the report, re-date the plans, etc., and copy the assessment prepared and made by him some two years before for a former by-law—afterwards set aside as invalid—passed by the plaintiffs to authorize the doing of the work authorized by the by-law in question.

The rule applicable to actions founded upon the statute, as this is, is that there can be no liability unless the preliminary steps prescribed by the statute have been complied with. This rule is very clearly laid down by Mr. Justice Gwynne in the case of *McKillop v. Logan* (7), in the following language: "In an action of this nature, it is, I think, the undoubted right of every person upon whom such a statutory debt is sought to be imposed, to insist that the plaintiff should establish by incontrovertible evidence that the provisions prescribed as necessary to the creation of the debt claimed have been complied with in the minutest particulars."

That was an action in which the plaintiffs sought to recover from the defendants a sum of money claimed to be due to the plaintiffs as a statutory debt in virtue of the provisions

of the Ditches and Watercourses Act. Also see Dillon on Municipal Corporations, 4th ed., sec. 769, p. 941.

For the plaintiffs it is said that, even if the engineer failed to comply with the requirements of sec. 570, yet, having regard to the language of sec. 580, what he in fact did must be looked upon as a compliance with sec. 570, and, therefore, binding on the defendants.

Under sec. 570 it was clearly the duty of the engineer to —(1) make an examination of the creek from which it was proposed to remove obstructions; (2) make plans and estimates of the proposed work; and (3) make an assessment of the real property to be benefited by such work, stating as nearly as might be what, in his opinion, would be the benefit which every road and lot or portion of lot would derive from the proposed work.

The manifest purpose of the Legislature in requiring the engineer to make such an examination was that he might acquire information which would enable him not only to prepare plans and estimates of the proposed work, but also to determine the gross amount to be assessed against roads and lots for the cost thereof.

If the construction sought to be put upon sec. 580 by the plaintiffs be the true one, then if what purports to be a copy of the report, plans, specifications, assessment and estimates of an engineer appointed under sec. 570 is served upon the head of the council of a municipality into which a proposed work is to be continued, and not appealed from, it would become binding on the council of such municipality, and they, under sec. 581, would be required to raise the sum named, even although, as here, the engineer after his appointment by the council neither made an examination of the locality in which the proposed work was to be done nor an assessment after examination of roads and lots or parts of lots which would derive a benefit from such work.

This could not have been the intention of the Legislature. It seems to me that sec. 580 contemplated a substantial compliance by the engineer with the duties cast upon him by sec. 570. It cannot be that a copy of a report, plans, assessment,

etc., made by an engineer two years before the plaintiffs were authorized to appoint him to do the work in question, can be regarded as a performance by him of his duties under sec. 570.

In *In re Robertson and North Easthope* (8), my brother Street, in my opinion, correctly states the duties of an engineer appointed under the last named section in relation to the assessment thereby directed to be made, thus: "The duties imposed upon the engineer are, to a certain extent, judicial in their character, and are such as he alone should perform. He is not, it is true, required to do with his own hand all the work from its inception to its completion, and he is at liberty, if he deem proper, to employ assistants; but the work of examining and assessing the several parcels of land affected, for their due proportion of the cost of the drain, should be done by himself or under his immediate direction."

Persons whose lands may be assessed for the cost of such a work are, as it appears to me, entitled to have not only the character of the work itself but their liability in respect of the cost thereof ascertained by the engineer after and not before his appointment by the council to do the acts which the statute requires him to do.

I think there was no assessment by the engineer within the meaning of the last mentioned section, and that sec. 580 was not intended to give and does not give validity to the so-called assessment.

The appeal, in my opinion, should be dismissed and the judgment of the trial Judge affirmed.

The Court being divided in opinion, the appeal was dismissed.

Reversed by Supreme Court. See next page.



## THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

THE TOWNSHIP OF ELIZABETHTOWN (*Appellant*) PLAINTIFF,

AND

THE TOWNSHIP OF AUGUSTA (*Respondent*) DEFENDANT.

(Reported 32 Sup. Ct. Rep. 295.)

*Drainage — Removal of Obstruction — Municipal Act, 1883, sec. 570 (Ont.) Mun. Amendment Act, 1886, sec. 22—Report of Engineer.*

In 1884 a petition was presented to the council of Elizabethtown asking for the removal of a dam and other obstructions to Mud Creek into which the drainage of the township and of Augusta adjoining emptied. The council had the creek examined by an engineer, who presented a report with plans and estimates of the work to be done and an estimate of the cost and proportion of the benefit to the respective lots in each township. The council then passed a by-law authorizing the work to be done, which was afterwards set aside on the ground that the removal of an artificial obstruction was not contemplated by the law then in force, sec. 570 of the Municipal Act, 1883. In 1886 the Act was amended and a fresh petition was presented to the council of Elizabethtown, which again instructed the engineer to examine the creek and report. The engineer did not again examine it (its condition had not changed in the interval) but presented to the council his former report, plans, specifications and assessments, and another by-law was passed under which the work was done. In an action to recover from Augusta its proportion of the assessment:

Held, affirming the judgment of the Court of Appeal (2 Ont. L. R. 4) Strong, C.J., dissenting, that the amendment in 1886 to sec. 570 of the Municipal Act, 1883, authorized the council of Elizabethtown to cause the work to be done and claim from Augusta its proportion of the cost.

Held, further, reversing said judgment, that the report of the engineer was sufficient without a fresh examination of the creek and preparation of new plans and a new assessment.

Appeal from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the defendant.

\*PRESENT:—Sir Henry Strong, C.J., and Sedgewick, Girouard and Davies, JJ.

(Mr. Justice Gwynne was present at the hearing but died before judgment was given).

The facts of this case are stated by Armour, C.J.O., in the Court of Appeal, as follows:

Mud Creek flows from Mud Lake in the township of Elizabethtown, in an easterly direction through lots 28 to 14, inclusive, and through part of lot 13 in the 8th concession of the said township, and thence through part of lot 13 and through lots 12 to lot A inclusive, in the 9th concession of the said township, and thence across the town line between the townships of Elizabethtown and Augusta; thence through lot 37 in the 9th concession of Augusta and across the concession line between the 8th and 9th concessions, and thence through part of lot 37 and through lot 36 in the 8th concession of the last mentioned township, on which last mentioned lot was a mill dam owned by one Bellamy, which penned back the waters of the said creek and caused them to overflow a large quantity of land in the said townships. Negotiations were had with the said Bellamy for the removal of the said dam, who agreed to do so for the sum of \$5,000.

In 1884, a petition having been presented to the council of Elizabethtown, for the removal of obstructions, the principal of which was the said dam, which prevented the free flow of the waters of the said creek, the council acting in accordance, as they thought, with the law as it then was—the Consolidated Municipal Act, 1883, section 570—procured one Willis Chipman, an engineer, to make an examination of the creek from which it was proposed to remove obstructions, and procured plans and estimates to be made of the work by such engineer and an assessment to be made by him of the real property to be benefited by such work, stating, as nearly as might be in his opinion, the proportion of benefit to be derived therefrom by every road and lot or portion of lot. Thereafter, in April, 1885, the said engineer made his report to the council of Elizabethtown with the said plans and estimates and the assessment made by him, and the council of Elizabethtown thereupon passed a by-law for the aforesaid purpose, and having served the council of the township of Augusta with a copy of the report, plans, specifications, assessment, and estimates, of the said engineer, the last men-

tioned council appealed and the arbitrators appointed determined that the law did not apply to the removal of an artificial obstruction, such as the dam above mentioned, and so the proceedings became abortive. And in order to remedy this difficulty, the Municipal Amendment Act, 1886, section 22, was passed amending section 570 of the Consolidated Municipal Act, 1883, by adding thereto sub-sections 18, 19, and 20, therein set forth.

Thereafter, on the 4th September, 1886, a petition was presented to the council of Elizabethtown, purporting to be of a majority of the persons shown by the last revised assessment roll to be the owners of the property to be benefited by the work therein mentioned, setting forth that a stream known as Mud Creek, running through the township of Elizabethtown, and from thence to the township of Augusta, in the county of Grenville, was obstructed by a certain dam belonging to one John B. Bellamy, erected on lot number 36, in the 8th concession of the said township of Augusta, then known as Bellamy's mill dam, and by other obstructions, which said dam and obstructions prevented the free flow of the waters of the said creek. That the said John B. Bellamy had agreed in consideration of five thousand dollars, to take down and remove said dam. That the taking down and removal of said dam, and of the other obstructions in said creek from said dam to the east side line of lot number 30, in the 8th concession of the said township of Elizabethtown, would benefit a large tract of land, to wit: lots numbers 5 to 29, inclusive, in the 8th concession of the said township of Elizabethtown, and lots numbers 1 to 16, inclusive, in the 9th concession of the said township of Elizabethtown, and lots 37 to 33, inclusive, in the 8th and 9th concessions of the said township of Augusta. And the petitioners prayed that the said mill dam and other obstructions in said creek might be removed (said mill dam being removed by carrying out and completing said proposed arrangement with said John B. Bellamy) from the said dam of the said John B. Bellamy, up to the east side line of lot number 30, in the 8th concession of said township of Elizabethtown, and that for that purpose

all proper steps might be taken in pursuance of the Municipal Act, and the sections thereof relating to drainage, and all proper by-laws passed and surveys made. It was admitted that the last revised assessment roll of the township of Elizabethtown at the time of the presentation of this petition was that of the year 1886, and that this petition was signed by a majority in number of the persons shown by the roll to be the owners, whether resident or non-resident of the property to be benefited in the township of Elizabethtown. The owners to be benefited in the township of Augusta were not taken into account. The council of Elizabethtown thereupon instructed the said Chipman to make an examination of the creek from which it was proposed to remove the said obstructions, and procured plans and estimates to be made of the work by turn and an assessment to be made by him of the real property to be benefited by such work, stating as nearly as might be, in his opinion, the proportion of benefit to be derived therefrom by every road and lot or portion of lot. Chipman did not proceed under these instructions to make another examination of the creek, and fresh plans and estimates and a new assessment, but on the 19th May, 1887, made a new report accompanying it with the plans, estimates and assessment he had previously made, and dating them as he dated the report. This report showed \$4,986 to be assessable against lands and roads in Elizabethtown, and \$764 against lands and roads in Augusta.

The council of Elizabethtown thereupon passed the prescribed by-law in due form and on the 20th July, 1888, the council of the township of Elizabethtown served the head of the council of the township of Augusta with a copy of the report, plans, specifications and estimates of the said engineer which were not appealed from. The council of the township of Augusta never passed any by-law as required by section 581 of the said Act for raising the sum named in the report as assessable against the real property in that township benefited by the said work, nor did they pay over the same or any part thereof to the township of Elizabethtown, and the council of the township of Elizabethtown having paid the whole

cost of the work, seeks in this action to recover against the defendants the sum named in the report as assessable against the lands and roads in the township of Augusta. The action was tried before Street, J., at Brockville, on the 14th June, 1900, ~~who dismissed the action~~ with costs, His Lordship being of opinion that the proceedings ~~were not~~ authorized by the Municipal Act.

The plaintiffs appealed from the judgment to the Court of Appeal in which their Lordships unanimously held against the ruling of Mr. Justice Street as to the statute law, but were equally divided in opinion on a ground not previously taken, Osler and Lister, JJ., holding that the engineer should have made a fresh examination and prepared a new assessment before reporting to the council the second time, while Armour, C.J.O., and Moss, J., were of opinion that the plaintiff should succeed. The judgment at the trial, therefore, stood affirmed, and the plaintiff appealed to the Supreme Court.

Watson K.C., and H. A. Stewart, for the appellant.

J. A. Hutcheson, for the respondent.

1902. March 11. The Chief Justice (dissenting) :—

If we could accept the construction placed on the statute in question here by Galt, J., in the case of *The Township of West Nissouri vs. The Township of North Dorchester* (2), namely, that the jurisdiction of the county council under section 598 of 46 Vict. ch. 18 was exclusive, and that the case was not one falling within section 570 and the following sections of the same Act, there would be no difficulty in deciding the present appeal. But although that would have seemed to have been a much more reasonable provision and much more just and equitable in its results as regards land-owners in the servient townships, yet such a construction cannot be adopted in the face of the permissive terms of section 598, especially when we find that section 570 and those sections which follow expressly include a case like the present, and however unfair and unjust the consequences we

are, therefore, bound to follow the plain language of the statute. Consequently this view, although concurred in by the Divisional Court in the case cited, cannot prevail.

Neither for the same reason can we adopt the ingenious interpretation of the learned Chancellor and hold that the landowners benefited in the two townships are to be considered as forming for the purposes of the Act, one mass, or a quasi-municipality, and that a majority of the whole body of owners in both townships (not a double majority as suggested by Henry, J., in *The Township of Chatham vs. The Township of Dover* (3), but a majority of the whole) should be held to be necessary to put the machinery of the Act in motion. This again would have been an improvement upon the actual enactment, but it manifestly was not the intention of the Legislature, and so to hold would be making the law and not merely construing the statute as we find it.

Mr. Justice Street was, however, bound by the judgment of the Divisional Court in the *West Nissouri Case* (4), and could not have done otherwise than follow it.

Then, adopting the construction which all the judges of the Court of Appeal have placed upon the Act, namely, that section 570 and the following sections of the amended Municipal Act of 1883 (so amended by the Act of 1886 as to include obstructions caused by mill dams) applied, I am still of opinion that the appeal should be dismissed.

The very harsh operation of these sections as applied to the present case, by which not only are the landowners in Augusta supposed to be benefited though against their will and made liable for what they did not want, but all the rate-payers of the township of Augusta are compelled to contribute to the expense of the removal of this dam though their properties were miles away from Mud Creek, alone make it incumbent on the Court to see that the appellants have made out their case when tested in the strictest manner. In the first place I agree entirely with Mr. Justice Lister in holding that the prerequisites to the respondents' liability have not

(3) 12 Can. S. C. R. 321, at p. 334.

(4) 14 O. R. 294.

been performed. I agree in the quotation from Mr. Justice Gwynne's judgment in *The Township of McKillop vs. The Township of Logan* (5), when he says that these pre-requisites must be found to have been complied with "in the minutest particular."

Then, it is not proved that Mr. Chipman, the engineer, ever made the examination, prepared the plans and estimates or made any assessment of the properties to be benefited at any time after the statute of 1883 had been so amended by that of 1886 as to include obstructions caused by mill dams. What he had done some years before when no statutory provision applied to such a case cannot on any known principles of law be utilized as a compliance with the statute. It is enough to say the requirements of the legislature were never complied with. It is not, however, merely a dry technical objection, but one which may be of great substantial importance to landowners, for in the interval between the date of the actual survey made by Chipman and the passing of the second by-law, ownerships might have changed, values altered and many other things have occurred making it material that there should have been a proper compliance with the Act by an actual examination, assessment and estimates subsequently to the amending Act.

Then, I do not agree with the learned Chief Justice that a debt obliging the municipality as a corporation was created. The duty of the municipality if it did not appeal was to enforce the assessment imposed on the landowners who profited by the supposed improvement. The statutory debt created was a burden upon these landowners and upon them alone. No words are to be found in section 580 or in any part of the Act imposing any duty upon the municipality beyond that stated. The case of *The Borough of Salford vs. The County of Lancashire* (6), is in my judgment precisely in point to show that the only remedy against the respondents by way of action was one in the nature of the common law action upon the case to which the statute of limitations, which is pleaded, would be a bar.

As to a mandamus, the case is altogether too stale to warrant any interference in that way even if all the statute required had been complied with.

A further objection which appears to have been taken at the trial and which was also taken in the reasons of appeal and in the respondents' factum here, was that it nowhere appears in proof that a majority of the owners benefited in Elizabethtown alone joined in the petition. I can discover no evidence upon which an answer to this objection can be based, and as it goes to the very root of the proceedings it must be considered fatal.

In my opinion the appeal should be dismissed.

This judgment, however, is a dissenting one since my learned brothers, Sedgewick, Girouard and Davies differ from me. In their opinion the appeal should be allowed.

The judgment of the majority of the Court (Sedgewick, Girouard and Davies, JJ.) was delivered by:—

Davies, J.—Two questions only arose upon this appeal. One was of a substantive character and went to the root of the action. It was based upon the proposition that the proceedings taken by the township of Elizabethtown for the removal of the dam in the township of Augusta were ultra vires and were not covered or cured by the amendment of 1886 to the Municipal Act, and that therefore the plaintiff could not recover from defendant any share of the expenditure incurred by it in the removal of that dam and other obstructions in such parts of Mud Creek as were situated in Augusta township.

The other objection was as to the regularity of the proceedings, it being contended that the engineer had not made such a survey of the lands to be affected by the improvements as was required by the statute. It is upon this latter objection only that there appeared to be any difference of opinion in the Court of Appeal for Ontario.



We are of opinion, for the reasons given by Mr. Justice Moss, that the proceedings on the part of the engineer must be taken to have been legal and effective, and for the reasons given by Chief Justice Armour on the main ground we think that the amendments of 1886 to the Municipal Act gave the plaintiff ample authority to take the proceedings it did for the removal of the dam and other obstructions, and to maintain this action against the defendant (respondent) for the amount of the cost assessable against lands and roads in Augusta township.

The appeal therefore will be allowed with costs in this Court and in the Court of Appeal and judgment entered for the plaintiff in accordance with the judgment of Chief Justice Armour.

*Appeal allowed with costs.*

Solicitor for the appellant: H. A. Stewart.

Solicitors for the respondent: Hutcheson & Fisher.

## [DIVISIONAL COURT.]

MCCLURE vs. THE CORPORATION OF THE TOWNSHIP OF  
BROOKE.

BRYCE vs. THE SAME.

(Reported 4 O. L. R. 97.)

*Drainage Referee—Official Referee—Drains—Damages—Reference.*

An official referee is only official in the sense of being an officer of the Court.

The Drainage Referee being an officer of the Court with all the necessary powers, is an official referee for the purposes and within the meaning of the Arbitration Act, and an action for damages in connection with the construction of drains may be referred to him.

Judgment of Meredith, C.J.C.P. reversed.

These were appeals from the judgments of Meredith, C.J.C.P., in the above two actions, which were argued together as the point in question was the same in both.

J. Grayson Smith, for the motions.

J. H. Moss, contra.

The following statement of facts is taken from the judgment of Britton, J., in the Divisional Court.

The actions were brought to recover damages for flooding the plaintiffs' lands, such damages being, as the plaintiffs contended, outside of and additional to those recoverable by proceedings under 1 Edw. VII. ch. 30, sec. 4 (O.) amending R. S. O. 1897 ch. 226.

The plaintiffs are also proceeding under that Act for such other damages, which, if recoverable, can be recovered only by trial before the Drainage Referee; and for convenience and to save expense, the plaintiffs desire to have their respective actions referred, so that the whole matter may be disposed of by that officer.

Motions to refer were heard by Chief Justice Meredith in Chambers on January 30th, 1902, and he dismissed both

applications, on the ground that the Drainage Referee is not an official referee within the meaning of the Arbitration Act, by the following judgment.

Meredith, C.J. (at the close of the argument) :—If I were able to come to the conclusion that the Drainage Referee is an official referee within the meaning of sec. 29 of the Arbitration Act, R. S. O. 1897 ch. 62, I think the proper course would be to refer to him as an official referee all the matters of which the plaintiffs complain which are not within the provisions of sec. 4 of the Act of 1901, 1 Edw. VII. ch. 30, but I think it is clear that the Drainage Referee is not an official referee; he is a special officer appointed for the purpose of the drainage works and matters arising out of them, and the provisions of the sections which make reference to the powers of an official referee are, I think, only for the purpose of giving to him as to those matters the powers which, under the various Acts that are referred to, an official referee may exercise.

That is quite a different thing from making him an official referee.

It would follow, if he were an official referee, that a reference in any case might be made to him. I think that would be contrary to the spirit and intent of the legislation. This officer was set apart for this special kind of work. I think, therefore, that I have no jurisdiction to make the order which is asked.

I think, however, that it is in furtherance of justice and the interest of the parties, that the proceedings in these actions should not go on until the references before the Drainage Referee are concluded. The result of those references will be to determine whether or not there are matters outside of the scope of sec. 4. If there are, the plaintiffs should then have the right to go on to try their actions as to them. If there is none, then these actions can be disposed of.

I propose, therefore, if the plaintiffs desire it, to make orders staying the proceedings in these two actions pending the references under the Drainage Act, with liberty to either

party to apply. The costs of these applications will be in the cause to the successful parties.

From this judgment the plaintiffs appealed, and the appeal was argued on February 10th, 1902, before a Divisional Court composed of Falconbridge, C.J.K.B., and Britton, J.

G. H. Watson, K.C., for the appeal. The plaintiffs are entitled to damages for acts of misfeasance. The Drainage Referee has exclusive jurisdiction in all matters within the meaning of the Act. He is an official referee, an officer of the High Court, and his term of office is the same as that of an official referee: R. S. O. 1897 ch. 226, sec. 88, sub-secs. 2 and 4. He has all the powers of an official referee: sec. 89. He may report on references to him under secs. 28 and 29 of the Arbitration Act, R. S. O. 1897 ch. 62, where the reference would only be made to an official referee: sec. 110. The official referees named in sec. 141 of the Judicature Act may be added to: sub-sec. 2; and the drainage referee was subsequently appointed.

J. H. Moss, contra. These sections are not limited to attacking the drains on the plaintiffs' properties, but attack the whole system of drainage. The object of the amending Act was to remove all drainage matters from the High Court to the drainage referee. The Legislature provided for such reference by sec. 94 of the original Act, but has now repealed it. If this action can be referred to the Drainage Referee any action could, and he would be an official referee for all purposes. If he is an official referee why confer powers on him and settle the terms of his office as the same as that of an official referee? Section 141 of the Judicature Act names official referees and does not include the drainage referee.

Watson, in reply.

1902. April 17. Britton, J.:—

Before the passing of ch. 30, 1 Edw. VII. (1901), there would have been no difficulty, as sec. 94, ch. 226 R. S. O. 1897, gave the Court or a Judge power, on the application

of either party or otherwise, and at any stage of the action, to make an order transferring or referring such action to the referee, but sec. 94 is repealed.

And now, if a claim is made for damages resulting from anything coming within sec. 4 of the amending Act of 1901, such claim can be heard and tried by the Drainage Referee only, and if the claim is wholly or in part for damages outside of what is provided for by sec. 4, there is no power to refer it to the Referee, unless it can be done under the Arbitration Act, R. S. O. 1897 ch. 62, secs. 28 and 29.

The power under the Arbitration Act is to refer the case to (1) a Judge of a County Court; or (2) to an official referee; or, if the parties agree, (3) to a special referee. Unless the parties agree, there can be no reference to the Drainage Referee unless he is an official referee.

I have come to the conclusion, although with great hesitancy and with the greatest respect for the opinion of the learned Chief Justice, that the Drainage Referee is an official referee within the meaning of the Arbitration Act, to whom such an action as this may be referred.

There is no statutory definition of official referee, but sec. 141 of the Judicature Act names persons by their office who are official referees, and the Drainage Referee is not there named.

The Drainage Act, R. S. O. 1897 ch. 226, secs. 88 and 89, makes the drainage referee (1) an officer of the High Court; and (2) confers upon him all the powers of an official referee under the Judicature Act and Arbitration Act.

I think an official referee is only official in the sense of being an officer of the Court.

The Drainage Referee being an officer of the Court, with all necessary powers, is an official referee for the purposes and within the meaning of the Arbitration Act.

Con. Rule 12 provides that all the officers of the Court shall be auxiliary to one another for the purpose of promoting the convenient and speedy administration of business.

The Interpretation Act, sec. 8, sub-sec. 22, is as follows:—"Wherever power is given to any person, officer or functionary to do or to enforce the doing of any act or thing, all such powers shall be understood to be also given as are necessary to enable such person, officer, or functionary to do or enforce the doing of such act or thing."

For above reasons, and the Drainage Referee being specially qualified by sec. 89 of the Drainage Act with the powers of referee under the Arbitration Act, I think the appeal should be allowed, and that this case should be referred to him.

Costs of appeal to be costs in the cause to the plaintiff in any event.

Falconbridge, C.J.:—I agree. The answer to the argument *ab inconvenienti* is that the Court can always exercise its discretion as to what kinds of cases ought to be referred to this class of official referee.

Decision of Divisional Court reversed by Court of Appeal. See report following.

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## COURT OF APPEAL, ONTARIO.

BRYCE vs. TOWNSHIP OF BROOKE.

M'CLURE vs. TOWNSHIP OF BROOKE.

*Drainage Referee—Jurisdiction—Official Referee—Reference.*

The Drainage Referee appointed for the purpose of the Drainage Laws is not an 'official referee' within the meaning of Sections 28 and 29 of the Arbitration Act, R. S. O. ch. 62. His jurisdiction is limited to the administration of proceedings under the Drainage Act.

Judgment of a Divisional Court reversed.

Appeal by leave from order of a Divisional Court reversing an order of Meredith, C.J., reported in the next preceding pages.

J. H. Moss, for appellants.

G. H. Watson, K.C., and N. Sinclair, for plaintiffs.

December 24th, 1902.

The judgment of the Court (Moss, C.J.O., Osler, Mac-lennan, Garrow, Maclaren, J.J.A) was delivered by

Osler, J.A.:—

Judges of the County Court and certain specified officers of the Supreme Court of Judicature and the High Court are by sec. 141 (1) of the Judicature Act declared to be official referees for the trial of such questions as shall be directed to be tried by such referees.

The Drainage Referee is not one of these officers.

If other and additional official referees are required, and the President of the High Court so certifies, "the Lieutenant-Governor may from time to time appoint other and additional official referees accordingly:" sec. 141 (2).

The Drainage Referee has not been appointed an official referee under this clause.

A person, therefore, who is not an official referee *ex officio*, i.e., by virtue of and as incidental to the holding of some other office, can become such only by special appointment as official referee, and the only authority for making such appointment seems to be under sec. 141 (2).

By the Arbitration Act, R. S. O. ch. 62, sec. 28, subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or Judge may refer any question arising in any cause or matter for inquiry and report to any official referee or to a special referee agreed on by the parties.

And by sec. 29 in certain specified cases the Court or Judge may refer the whole cause or matter or any question or issue of fact arising therein or any question of account to be tried before a special referee agreed on by the parties or before an official referee.

The reference, therefore, can be made only to a person who is such an officer, or by consent to a special referee agreed on by the parties.

By sec. 88 (1) of the Municipal Drainage Act, R. S. O. ch. 226, the Lieutenant-Governor in Council may from time

to time appoint a referee for the purpose of the drainage laws.

The person so appointed shall be deemed to be an officer of the High Court, sec. 88 (2), and he shall hold office by the same tenure as an official referee under the Judicature Act.

The Drainage Referee, therefore, while an officer of the High Court and holding his office by the same tenure as an official referee, is an officer specially appointed for the administration of the drainage laws, and his powers as Drainage Referee are specified and defined in sec. 89, inter alia, sub-sec. (1). He shall have the powers of an official referee under the Judicature and Arbitration Acts, and of arbitrator under any former enactments relating to drainage works, and he is substituted for such arbitrator.

If, however, he is not one of those officers who is ex officio an official referee under sec. 141 (1) of the Judicature Act, and has not been appointed as such by the Lieutenant-Governor under sec. 141 (2), I do not see how he can be regarded as an official referee under that Act, merely because he happens to be a different kind of referee and officer of the High Court under another Act, with special powers incidental to the exercise of his jurisdiction under that Act. Rule 12 of the Judicature Act, referred to in the judgment below, which provides that all officers of the High Court shall be auxiliary to one another for the purpose of promoting the convenient and speedy administration of business, does not seem to me to advance the argument in favour of the Drainage Referee being an official referee, because whatever may be his powers as Drainage Referee, for the purpose of the Drainage Act, the sole question is whether he is an official referee within the meaning of the Judicature Act and Arbitration Act, to whom references may be made in invitum under the latter Act. I cannot agree with the Court below in holding that "an official referee is official only in the sense of being an officer of the Court." He is an official referee by virtue of an appointment to that office, or ex officio as being the holder of another specified office. All official referees are officers of the Court, but it does not follow that all referees who are officers of the



Court are official referees. If it did, a special referee would, by virtue of sec. 30 (1) of the Arbitration Act, be an official referee.

Section 8, sub-sec. 22, of the Interpretation Act is also relied upon in the judgment below. I do not think it necessary to quote it, but it can have no application unless the Drainage Referee is ex officio or by appointment an official referee.

Then it is said that sec. 110 of the Drainage Act assumes that the Drainage Referee is an official referee to whom reference may be made under sub-sec. 2 of sec. 29 of the Arbitration Act. The answer to that, again, is, that his status must be found in some appointment direct or ex officio as such. The section (110) is not one dealing with his jurisdiction, but with appeals from his decisions, and (if this part of it is still in force now that sec. 94 of the Act has been repealed by 1 Edw. VII. ch. 30, sec. 5) it may embrace the case of a decision or report of the referee acting as special referee by consent of parties. It goes no further.

The jurisdiction of the Drainage Referee appears to me to be limited to the administration of proceedings under the Drainage Act. The powers conferred upon him are incident to that jurisdiction. The repeal of sec. 94 emphasizes this. As that section stood in the revised statutes there was express authority to refer just such a case as this to him. If, as I think, he is not an official referee, that power no longer exists. I am therefore of opinion that the order of the Divisional Court is wrong and ought to be reversed, and the judgment of Meredith, C.J., restored. Costs follow.

# IMPORTANT DECISIONS RELATING TO THE DITCHES AND WATERCOURSES ACT.

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## COMMON PLEAS.

Michaelmas Term, 31 Victoria, 1867.

Hon. William Buell Richards, C.J.

“ Adam Wilson, J.

“ John Wilson, J.

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MURRAY vs. DAWSON.

(Reported 17 U. C. C. P. p. 538.)

*Fence-viewers' Act (C. S. U. C. ch. 57)—Non-compliance with Award—  
Restriction to Statutory Remedy—Pleading.*

The declaration was against the defendant as owner of a lot adjoining the plaintiff's land, alleging the existence of a large quantity of surplus water upon both lots; that both parties disputed as to their respective rights and liabilities under the Fence-viewers' Act (C. S. U. C. ch. 57), and steps were thereupon taken to procure an award under said Act, which was accordingly done, and an award made in the presence and with the assent of both parties. The declaration then went on to recite the award verbatim, which directed two ditches to be made by the parties, one by each, and concluded thus: "Said ditch to be made before the 1st October, 1865." Plaintiff then averred performance of the award on his part, but a neglect and refusal to perform it on the defendant's part, and claimed damages for such neglect and refusal.

Held, on demurrer, that the declaration was not bad as failing to disclose a case which gave the fence-viewers jurisdiction, which it sufficiently did, but that it was bad as setting out an award which did not fix the time each party should have within which to perform his share of the ditching, or direct where such ditching should be made; and also for not showing that a demand in writing had been made on the defendant to perform the award, the non-compliance with which would have entitled the plaintiff under the Act to have completed the ditch and sued for the price fixed instead of bringing an action for damages, which could not be maintained.

The eleven sub-sections of section 16 of the above Act refer to ditches and watercourses as well as to fences.

The declaration is sufficiently stated in the head note.

The defendant pleaded a plea, which was demurred to, and to which it is unnecessary further to refer, as the judgment of the Court turned on the following, among other,

exceptions to the declaration, which were given notice of by the defendant:

1. That the declaration does not set out such a case of action as gives jurisdiction to fence-viewers under the statute.

2. It does not appear that the fences-viewers were satisfied that the defendant was duly notified of the meeting.

3. The length of time the plaintiff and the defendant had respectively to open the ditches does not appear to be stated in the award, which is consequently bad.

5 That no demand in writing appears to have been made on the defendant to perform the award, and had such been made the plaintiff might and ought to have finished the ditch and sued for the price.

7. That the place to dig or open the watercourse is not definitely stated in the award.

McMichael, for the plaintiff, referred to and commented upon the Fence-viewer's Act, secs. 13, 14, and Russell on Awards, 505.

D. B. Read, Q.C., contra, referred to secs. 3, 14, 16, of the above Act, and B. & L.'s Prec. 424, 425.

J. Wilson, J., delivered the judgment of the Court.

The declaration is objected to on several grounds. As to the first, we think it does not set out a case which gave the fence-viewers jurisdiction. It sets out all the circumstances mentioned in the seven sections of the 22nd Vict. ch. 57, and that a dispute had arisen in regard to the rights and liabilities of these parties, as mentioned in the fifth section.

We think there is nothing in the second objection: the proceedings of the fence-viewers are alleged to have been conducted, and the award made in the presence of both parties, and with their assent.

We think the third objection is good. The twelfth section requires that the fence-viewers shall decide what length of time each of the parties shall have to make his share of the

ditch. The award says: "Said ditch is to be made before the first day of October, 1865." On reading it two ditches are spoken of; one to be made by the plaintiff, another by the defendant, beginning at the same fence. The last ditch spoken of in the award is the defendant's. If the time applies to hers, there is no time for the plaintiff to make his; if it applies to the plaintiff's ditch, there is no time specified for the defendant to make hers. It does not appear by the award that it is to be one continuous ditch, but rather two ditches, and is bad for not appointing the time for both parties to make it, and where it is to be made.

The fifth objection we think well founded, and it puts an end to the action. In *Berkeley vs. Elderkin* (1), the principle is recognized, "that where new rights are given, with specific remedies, the remedy is confined to those specially given." Much that was said by Lord Campbell applies by analogy with great force here. In clearing our forests, much inconvenience was felt in many places from the land being wet, and as the tracts granted to settlers were small, it was frequently impossible to drain one lot without trespassing upon another, or for one man to drain his land without the assistance of others equally interested in draining theirs, while without such drainage the land could never have been cleared and cultivated. In view of this the Legislature, in providing for the rights and liabilities of adjacent proprietors with regard to fences, provided for a simple and cheap system of opening ditches or watercourses, by the 8th Vict. ch. 20, secs. 12, 13, 14. This Act imposed the duty on those who were interested in drains to contribute a just share: it gave the right to make ditches across the lands of those who were not interested, and where disputes arose, it enabled the parties to apply to the fence-viewers to award concerning their disputes. It provided that if any party neglected or refused, upon demand made in writing, to open, or make and keep open, his share awarded to him by the fence-viewers, within the time allowed, either party, after completing his own part,

(1) 1 El. & B. 805.

might open the part of the party neglecting or refusing, and be entitled to recover not more than two shillings per rod from the party neglecting or refusing to open his share, in the same manner as the Act provides for payment of line and division fences.

But our attention has been called to the fact, that, in the consolidation of this Act by the 22 Vict. ch. 57, while section 16 enacts that to ascertain the amount payable by any person, who, under the authority of this Act, makes or repairs a fence, or makes, opens, or keeps open any ditch or watercourse which another person should have done, and to enforce the payment of such amount, the following proceedings shall be taken, the eleven sub-sections refer to fences only, and ditch or watercourse is omitted, upon which it is contended that there is no remedy to recover the amount payable in respect to a ditch or watercourse.

We do not think so. When we see that this section, as well as those which precede it, respecting ditches or watercourses, gives the right to recover from the defaulting party the amount of work the other performs, upon his default, not exceeding the price per rod fixed by the statute, we think we should not be justified in holding that, because in prescribing the proceeding for its recovery, the Legislature had omitted to repeat the word ditches or watercourses, it intended to withhold that which it had so clearly given. Looking at the provision of the original statute and of this, we are of opinion that the proceedings mentioned in the eleven sub-sections of section 16, have reference to ditches or watercourses, as well as to fences. In *Doe Murray vs. Bridges* (2), it is said by Tenterden, C.J.: "We are to look at the Act to learn by what mode the intention is to be carried into effect."

In this view of it, it follows that this plaintiff had his remedy under this statute and no other; that he ought to have demanded of this defendant performance of this award, and if she made default, that he ought to have opened her

ditch, and compelled her to pay for it under the provisions of this Act: *The Vestry of St. Pancras vs. Batterbury* (3). Cockburn, C.J., at page 486, says: "Where an Act of Parliament creates a duty or obligation, and gives a remedy for a breach of it by a peculiar proceeding, a question arises whether the remedy so provided is the only one to be had recourse to, or whether it is cumulative."

Here, as in that case and for similar reasons, we think the Legislature intended that the summary proceeding pointed out should be the only one.

To hold otherwise would, we think, open an appalling source of litigation, ruinous to all concerned in it, and opposed to the spirit and intention of the Legislature, which, we think, was to place in the hands of either party interested the right to specific performance of the relief sought, but not damages by suit for non-performance of it.

Judgment for defendant in exceptions to declaration.

## QUEEN'S BENCH.

Michaelmas Term, 38 Victoria, 1869.

Hon. Joseph Curran Morrison, J.

Hon. Adam Wilson, J.

DAWSON vs. MURRAY.

(Reported 29 U. C. Q. B. p. 464.)

*Fence-viewers—Defective Award by—Justification under—Pleading.*

The plaintiff and defendant, occupying adjoining lots, having disputed as to the drainage of surface water, referred the question to fence-viewers, who awarded that defendant should open a ditch from the line fence between himself and plaintiff, through the plaintiff's farm, of sufficient depth to carry off the water then in the ditch opened by defendant, about twenty rods in length, and that the plaintiff should make and keep open this same portion of ditch, commencing at the line fence, and of sufficient length, width and fall, to carry off the water, to be two and a half feet deep at the line fence; said ditch to be made before the first October, 1865.

Held, following *Murray vs. Dawson*, 17 C. P. 588, that the award was bad, for not sufficiently defining the point of commencement and course and position of the ditch.

Semble, however, that it was not bad, as decided in that case, for omitting to specify the time within which each party was to perform his share of the work, for that the time mentioned applied to both.

To an action for trespass on the plaintiff's land defendant pleaded justifying under the award, alleging that the plaintiff paid half the expense of the award as thereby directed, and that defendant, in pursuance of it, having first duly notified the plaintiff, entered on the plaintiff's land and opened the ditch there as directed by the award, doing no unnecessary damage. Held, that the plea was bad, as setting up a right which the award, being invalid, could not give; but that the facts might be found to support a plea of leave and license.

Declaration for trespass to lot 2, in the south-east boundary of Ushorne.

Third plea.—That defendant, before the commencement of this suit, and before the alleged trespass, and after the passing of Consol. Stat. U. C. ch. 57, entitled "An Act respecting Line Fences and Watercourses," was the owner thereof, possessed of, and occupied and resided on lot number

one, south-east boundary of the township of Usborne, in the county of Huron, with the appurtenances thereunto belonging, and the plaintiff was also during all the time aforesaid possessed of, and occupied and resided on lot number two, south-east boundary of the said township of Usborne, and adjoining on the said lot of the defendant, being the land in the said declaration mentioned; that a large quantity of surplus water, from swamps and low miry lands, during all the times aforesaid collected, accumulated and was in and upon the said land of the defendant, and in and upon the said lands of the plaintiff; that the watershed or natural flow of the water was always towards the said land of the plaintiff; and it thereupon became and was the joint interest of the plaintiff and defendant to open a ditch or watercourse for the purpose of letting off such water as aforesaid, in order to enable both the plaintiff and defendant to cultivate and improve their respective aforesaid properties; that the plaintiff and defendant disputed in regard to their respective rights and liabilities under the said Act, and also respecting the opening, making and paying for the said ditch or watercourse, and thereupon he, the defendant, by writing notified three of the fence-viewers of the said township of Usborne, within which the respective properties of the defendant and plaintiff are situated, and in which the plaintiff and defendant then resided and still reside, of such dispute, and named in the notice of the investigation thereof the time and place of meeting; and the defendant also notified the plaintiff of the time and place of meeting of such fence-viewers for the purpose aforesaid; that on receiving such notice the said fence-viewers attended at the time and place named in such notice, and the plaintiff and defendant also attended at such time and place before said fence-viewers, on said dispute, with their respective witnesses; and thereupon in the presence of the plaintiff and defendant, and with their concurrence and consent, and at their request, and in pursuance of such notice, and for the purpose aforesaid, the said fence-viewers there and then examined the premises so occupied by the plaintiff



and defendant respectively, the premises of the plaintiff being the premises in the declaration mentioned as aforesaid, and heard the parties and their witnesses; and thereupon they made their award in writing, signed by them, touching the premises, which said award is in the words and figures following, that is to say:

"This determination, made the 14th day of July, 1865, between Alexander Murray and Margaret Dawson, both of the township of Usborne, with regard to drainage of water on lot number 1, on the south-east boundary of Usborne. 1st. That Alexander Murray is to open a ditch from the line-fence between himself and Margaret Dawson, through Margaret Dawson's farm, of sufficient depth to carry off the water at present in the ditch now opened by Alexander Murray, in or about twenty rods in length, and that Margaret Dawson is to make and keep open this same portion of ditch, commencing at the line-fence, and of sufficient length to carry off the water, said ditch to be two and a half feet deep at the line fence, and of sufficient width and fall to carry off the water; said Margaret Dawson may cover said ditch, providing she leaves an open space in the same sufficient to carry off the water; said ditch to be made before the 1st day of October, 1865. 2nd. That Alexander Murray is to pay half the expense of this determination, and Margaret Dawson to pay the other half of the expense.

Given under our hands this 14th day of July, 1865.

(Signed) JOHN HUNTER,

(Signed) DAVID TURNBULL,

Fence-viewers."

And the defendant avers that said fence-viewers immediately thereupon transmitted the said award to the clerk of the said township of Usborne, and delivered a copy thereof to the parties requiring the same; that the plaintiff had due notice of the making and publication of the said award, and paid the half of the expense of the same as directed by said award; that the defendant, in pursuance of the said award.

and under and by virtue thereof, having first duly given reasonable notice to the plaintiff, entered in and upon the said land of the plaintiff, being the land in the said award and declaration mentioned, to open, and did open the said ditch as directed by said award, from the line-fence between the plaintiff and defendant through the plaintiff's farm, being the land in the declaration mentioned as aforesaid, of sufficient depth to carry off the water then, to wit at the date of said award, in the ditch then before opened by the defendant, in or about twenty rods in length; said ditch was two and a half feet deep at the line-fence, and of sufficient width and fall to carry off the water; doing no more damage than was necessary for that purpose, and doing no unnecessary damages, which are the alleged trespasses in the declaration mentioned.

Demurrer, on the grounds: 1. That the length of time the plaintiff and defendant had respectively to open the ditches does not appear to be stated in the award, which is consequently bad. 2. That the particular course or place to dig the drain is not sufficiently set out as required by the statute.

C. S. Jones, for the demurrer. This matter was before the Court, as reported in 17 C. P. 588. The place of the ditch is too uncertainly described: *Mortin vs. Burge* (1), *Russell on Awards* (2). The time is not sufficiently stated when the plaintiff was to do her work, though it may sufficiently state when defendant was to do his part of it.

Robinson, Q.C., contra. The time is sufficiently stated, for the same time is applicable to both parties. There is a difference, moreover, between uncertainty which may entitle a party to have an award set aside by the Court, and uncertainty set up to an award where it is sought to make one who is acting under it a wrong-doer. It may be likened to the case of a parol license affecting realty. Such license will be a protection against being made a trespasser, though it passes

no interest, and though the licensee can maintain no action upon it: *Robinson vs. Fetterly* (3), *Beaver vs. Reed* (4), *Canada Co. vs. Pettis* (5).

Wilson, J.:—

In *Murray vs. Dawson*, as reported in 17 C. P. 588, this award was held to be defective, for not showing the time within which each party should perform the work or share which each had to do, and for not showing where the ditch was to be made. In that case Alexander Murray was the plaintiff, and Margaret Dawson the defendant, and the action was on the award, for non-performance of it by the now plaintiff.

In 19 C. P. 314, there is another case of *Murray vs. Dawson*, in which Murray alleged that Dawson had stopped up a certain drain, watercourse, channel, gutter, natural flow, course, or watershed, through Dawson's land adjoining Murray's land and through which he, Murray, was entitled to have the water collecting on his land drained off from the same. In that case Murray also failed, because it was held that there was no natural stream or watercourse through Dawson's land, and no obstruction by her in what she did which caused the alleged obstruction, namely, ploughing and harrowing her land.

Now Murray, the plaintiff in the two unsuccessful actions, has acted under the award, which it was decided in 17 C. P. 588, was the only remedy he had if Mrs. Dawson did not perform her part of the work; and because he has performed the work on her land in consequence of her having failed to do it herself, she has brought this action of trespass against him. He now asserts he had the right to do it under the award, and the question is whether he had such right or not.

The legal rights of the parties, independently of the award, are, that the defendant had, while not obstructed by the plaintiff, the right to continue to drain his land by the

lower level of the plaintiff's land, not materially concentrating or altering that natural flow. And he had the right to cut off or divert his surface-drainage on to the plaintiff's land whenever he pleased. The plaintiff, in like manner, had the right by embankment or otherwise to exclude or alter that natural drainage over her land whenever she pleased. And she had not the right to have this drainage continued from the defendant's land over her own land, though she had been in the habit of using such surface-water to profitable or beneficial purposes; as the right to have the flow of water, or to use it, applies only to water running in well defined channels, so as to be what are commonly called water-courses: *Broadbent vs. Ramsbotham* (6), *Rawstron vs. Taylor* (7), *Chasemore vs. Richards* (8). Just as the owner of a house may have the right to run the water from his eaves on to his neighbour's land, while the neighbour has no right to have this drip continued longer than the other pleases. The same also as to agricultural drains: *Wood vs. Waud* (9), *Greatrix vs. Hayward* (10.)

This mere natural right did not suit the defendant. He required a ditch or watercourse to be made to let off the surplus-water, to enable him to cultivate and improve his land, and he took proceedings under the statute cited, applicable to his case, to have his own and the plaintiff's rights and obligations settled in a binding manner.

The statute does not limit the parties who are concerned in the reference to the performance of the work only on their own respective lots. One party may have to do the whole work across his neighbour's land, or a portion of it, besides all the work on his own land.

The statute requires that the fence-viewers "shall decide what length of time each of the parties shall have to open the share of the ditch or watercourse which the fence-viewers decide each such party shall open": *Consol. Stat. U. C. ch. 57, sec. 12.* And it is said this award is defective, because

(6) 11 Ex. 602.

(8) 2 H. & N. 168; 7 H. L. Cas. 349.

(10) 8 Ex. 291.

(7) 11 Ex. 369.

(9) 3 Ex. 778-9.

the length of time the parties had respectively to open the ditch is not stated in the award.

I see it stated in the award that the defendant was to open a ditch from the line-fence between the parties through the plaintiff's land, about twenty rods in length, of sufficient depth to carry off the water then in the ditch opened by defendant, and that the plaintiff was to make and keep open this same portion of ditch. The defendant was authorized to open it, and the plaintiff was directed to make it. What difference was intended between opening and making I do not know. It may mean that the plaintiff, if she chose to make it herself, might do so, but if she did not, the defendant was to open it at his own expense. The plaintiff was afterwards to keep it open.

The award then proceeds: "Said ditch to be made before the first day of October, 1865." Now, I do not see why, if the plaintiff had to make the drain at her own option, the provision as to time does not apply to her as well as to defendant. I think it applies to both of them equally.

But here I am met by the judgment delivered by Mr. Justice John Wilson, in 17 C. P. 588, who thought the time was not applicable to both parties, because each of them had to make a separate ditch, "two ditches being spoken of, one to be made by plaintiff, another by defendant, beginning at the same fence."

In this award I find only one ditch spoken of—that which defendant was to open through the plaintiff's land—and the plaintiff "is to make and keep open this same portion of ditch."

In my opinion, therefore, on a different statement and view of facts, the time specified is applicable to both plaintiff and defendant.

The other objection, that the particular course or place to dig the drain has not been sufficiently set out in the award, was held to be a good one in 17 C. P. 588, and I am of opinion it must still prevail.

The direction that the plaintiff is to open a ditch "from the line-fence between the parties through the plaintiff's farm

for about twenty rods in length," not specifying the point of commencement, or the direction it was to be carried, must be too indefinite.

The plaintiff herself might have granted this power, and the defendant could have exercised it reasonably, as a general license to do the work any where through her farm as might be necessary. But she cannot be compelled to give the defendant so extensive a power, which he might use to her injury, and the fence-viewers, acting in a judicial capacity, should not have imposed a burden on her of so uncertain a nature, or have authorized the defendant to proceed in the work just as he liked. They should have prescribed the direction and extent of it, so that the plaintiff might know to what extent her estate was burdened, and the defendant might know with certainty where he was to work, and what it was he was authorized to do.

The argument that the award may be good as a defence in trespass, though not affording a substantial right of suit, cannot be maintained on this plea. The plea asserts a right. If it give no right, the right fails. The question, however, may properly arise under the plea of leave and license, which is on the record, if the work were done before any actual revocation of the license, real or implied, which the facts may support. The parties should submit anew to the arbitration of the fence-viewers, if they are so unreasonable, or if either of them is so, that they cannot settle this matter themselves. Three law suits, whatever else may result from them, will never drain the land.

The judgment must be for the plaintiff on demurrer.

Morrison, J., concurred.

Judgment for plaintiff.

## IN THE HIGH COURT OF JUSTICE.

[QUEEN'S BENCH DIVISION.]

O'BYRNE vs. CAMPBELL.

(Reported 15 O. R. 339.)

*Water and Watercourses—Drainage—Ditches and Watercourses Act, 1883, sec. 13—Award—Duty of Township Engineer—Damage to Land—Proximate Cause.*

After the time fixed by an award under the Ditches and Watercourses Act, 1883, for the completion of certain drainage work by neighbouring land-owners, the plaintiff, who was one of the parties interested in the award, in writing required the defendant, as township engineer, to inspect the work, with the object of having it completed according to the award; but, as the plaintiff alleged, the defendant neglected to inspect the work or cause it to be completed according to the award, and thereby the provisions of the award were not carried out, and the plaintiff in consequence suffered damage by reason of water remaining on his land, etc.

Held, that the provision of section 13 of the above Act as to the inspection by the engineer is imperative, and an action would lie for breach of his duty; but even if the evidence had shown such a breach, the damages claimed were not the proximate, necessary, or natural result thereof.

The other provisions of section 13 are merely permissive, and no action would lie for their non-performance; nor, were it otherwise, could it be held that the damages claimed were the proximate result of such non-performance.

Those who, by the terms of the award, ought to have done the work, were the persons proximately responsible for the damages.

Motion by the plaintiff to set aside the judgment at the trial dismissing the action, and to enter judgment for the plaintiff.

The action was tried by Rose, J., without a jury, at the Goderich Autumn Assizes, 1887.

The motion was argued before the Divisional Court on the 14th February, 1888.

The facts appear in the judgment.

Wallace Nesbitt, for the plaintiff.

Idington, Q.C., for the defendant.

March 9, 1888. Armour, C.J.:—

The plaintiff was the owner of the south half of lot number six in the third concession of the township of McKillop; Patrick and Edward Roach were the owners of the north half of lot number six in the second concession; the Canada Company were the owners of lot number seven and the east half of lot number eight in the second concession; and John Downey was the owner of the west half of lot number eight in the second concession of the said township.

The plaintiff had constructed a drain from the allowance for road between the second and third concessions at the south-east angle of his lot, along the allowance for road between lots numbers five and six in the second concession for a short distance along the easterly limit of lot number six in the second concession.

The plaintiff then, by a requisition under the provisions of the Ditches and Watercourses Act, 1883, procured an award to be made by the defendant, the engineer of the township of McKillop, for the continuation of the drain so made by the plaintiff across the south half of lot six, lot seven, and the east half of lot eight, and across the west half of lot eight to a drain theretofore awarded by the defendant to be made; which award provided for the making of the said continuation by the township of McKillop a part of the way across said lot number six, and for the completion thereof by the 30th November, 1884; for the making of the said continuation by the plaintiff another part of the way across said lot number six, and for the completion thereof by the 15th November, 1884; for the making of the said continuation by Patrick and Edward Roach the residue of the way across said lot number six, and for the completion thereof by the 10th November, 1884; for the making of the said continuation by the Canada Company all the way across lot number seven and the east half of lot number eight, and for the completion thereof by the 1st November, 1884; and for the making of the residue of the said continuation by John Downey, and for the completion thereof by the 15th October, 1884.



The plaintiff's statement of his cause of action alleged that after the time fixed in and by the said award for the completion of the said work, the plaintiff, who was one of the parties interested in the said award, in writing required the defendant as such engineer, pursuant to the statute in that behalf, to inspect the said ditch or watercourse with the view and object of having the same completed according to the said award, and that the defendant did not, as was his duty, inspect the said ditch or watercourse, or cause the same to be completed according to the said award; but, on the contrary, wholly failed and neglected so to do, whereby the provisions of the said award had not been carried out, and the plaintiff had in consequence been unable to cultivate or use his said land, and had his grass and other crops growing thereon greatly injured and destroyed, and had lost the beneficial use of his said land from the water which should have been carried away by the said drain remaining thereon.

The plaintiff's action is thus wholly grounded upon the provisions of section 13 of the Ditches and Watercourses Act, 1883, and I am of opinion that it is not maintainable.

The provision of that section as to the inspection by the engineer is no doubt imperative; and if the action would lie for the breach of this imperative duty, it is answered by the evidence that he did inspect, and if it were not so answered, it would be difficult to hold that the damages claimed were the proximate, necessary, or natural result of the breach of this duty.

The other provisions of that section are merely permissive, and I do not understand that any action will lie for the non-performance of duties which are merely permissive.

Were it otherwise, it would be impossible, I think, to hold that the damages claimed were the proximate, necessary, or natural result of the breach of them.

The damages claimed by the plaintiff were the proximate, natural, and necessary result of the drain not having been completed according to the terms of the award; but these who, by the terms of the award, ought to have done the

work of digging the drain were the persons proximately responsible for the damages, and not the defendant.

I refer to Walker vs. Goe (1), Barber vs. Lesiter (2), Nicholl vs. Allen (3), Sharpe vs. Hancock (4), Malone vs. Faulkner (5).

In my opinion the motion must be dismissed, with costs.

Street, J., concurred.

Falconbridge, J., not having been present at the argument, took no part in the judgment.

Motion dismissed.

(1) 3 H. & N. 395; S. C., 4 H. & N. 350.

(3) 1 B. & S. 916.

(2) 7 C. B. N. S. 175.

(4) 7 M. & G. 354.

(5) 11 U. C. R. 116.

## IN THE HIGH COURT OF JUSTICE.

[QUEEN'S BENCH DIVISION.]

HEPBURN vs. TOWNSHIP OF ORFORD ET AL.

(Reported 19 O. R. p. 585.)

*Water and Watercourses—Ditches and Watercourses Act, 1883—Work not in Accordance with Award—Remedy under sec. 13—Costs.*

Where an award has been made under the Ditches and Watercourses Act, 1883, the only remedy for the non-completion of the work in accordance with the award is that provided by section 13 of the Act.

Murray vs. Dawson, 17 C. P. 588, followed; and O'Byrne vs. Campbell, 15 O. R. 339, distinguished.

No other or greater costs were allowed to the defendants than if they had successfully demurred instead of defending and going down to trial.

The plaintiff by his statement of claim alleged: (1) That he was the owner and occupier of the south one-quarter of lot 16 in the 4th concession of the township of Orford, in the county of Kent. (2) That the defendant McKillop was the owner and occupier of the adjoining east one-quarter of the

same lot, and also of the south half of lot 17 in the same concession. (3) That the defendant Allison was the owner and occupier of the north half of lot 17, across the northerly part of which the Canada Southern Railway ran. (4) That the defendant Campbell was the owner and occupier of the adjacent lot 16 in the third concession. (5) That the defendants the township of Orford were a municipal corporation which had charge of, and jurisdiction and control over, and for the purposes of this action were the owners of, a public highway or road running between the 3rd and 4th concessions and between the lands owned by Campbell and those owned by the other defendants. (6) That for many years past these lands and road had been drained, so far as they were drained, by a natural depression or watercourse running across the lands of the plaintiff and of the defendants McKillop and Anderson in a north-easterly direction, and thence under and past the railway, and this watercourse had been somewhat improved from time to time by excavations therein for the purpose of making a ditch or drain, but as the lands became cleared and improved, and the road more travelled, they required more and better drainage than was afforded by this watercourse and the ditch or drain therein. (7) That on or about the 4th October, 1886, the engineer of the township, appointed under the provisions of the Ditches and Watercourses Act, made an award for the deepening and widening of the ditch or drain. (8) That by this award the defendants were required greatly to enlarge and improve this ditch or drain, and to make and straighten the course for the water of the size and dimensions mentioned in the award, and all of such work was to be done by the defendants along, from, and below and north-easterly of the plaintiff's land, and within the time limited in the award. (9) That some of the defendants appealed from this award, and on or about the 17th November, 1886, the Judge before whom the appeal was tried slightly amended the award, but otherwise confirmed it. (10) That if the drain or ditch had been made by the defendants as provided for in the award, or in the award as amended on appeal, it would have effectually drained

the plaintiff's lands. (11) That the defendants assumed and pretended to act and do work under and in pursuance of the award as amended on appeal, but they did not construct the drain as required thereby, and did not make it within the time specified and required, or of the size or dimensions or in the course specified, and by reason thereof the plaintiff was deprived of the drainage of his land to which he was entitled, and he thereby suffered great loss and damage to his crops and lands, and he was deprived of the use and benefit thereof, and the value of his farm was not enhanced as it would have been if such work had been done and the drain completed by the defendants. (12) That part of the drain required by the award and amendments extended upwards, through, and across and above the plaintiff's land, and that portion was properly constructed within the time limited, and by reason thereof the water was carried down upon the plaintiff's land more rapidly and in greater quantities than theretofore, and the loss and damage occasioned by the delay and default of the defendants was much greater than it otherwise would have been. (13) That the defendants, so far as they acted under and in pursuance of the award, did the work in a careless, negligent, and unskilful manner, and by reason thereof the drain was less serviceable for the purpose for which it was intended, and the plaintiff did not receive the benefit therefrom to which he was entitled, and by reason thereof he had suffered great loss and damage. (14) That the plaintiff had from time to time requested the defendants to make the respective portions of the drain allotted to them respectively by the award as provided therein, but that they had neglected and refused so to do.

The prayer of the statement of claim was for a declaration that the plaintiff was entitled to have the drain made, completed, and maintained by the defendants; for damages; and that the defendants might be ordered to make and complete the drain.

The defendants answered separately, but it is unnecessary to set out their statements of defence.

Issue was joined, and the cause was heard at the sittings at St. Thomas on the 3rd December, 1888, by Ferguson, J., who at the close of the plaintiff's case dismissed the action with costs, upon the facts therein appearing, without saying anything as to the question of jurisdiction; and counsel saying that there should be only one set of costs, His Lordship said: "I think I will leave that to the taxing officer. I say nothing about it. The action is dismissed with costs."

At the Hilary sittings of the Divisional Court, 1889, the plaintiff moved to set aside the judgment and to enter judgment for the plaintiff, or for a new trial, on the grounds: (1) That the judgment was contrary to law and evidence, etc. (2) That the plaintiff's claim was proved at the trial, the evidence of the engineer and other witnesses showing the ditch or drain in question to be incomplete according to the award made by the engineer and the amendments thereto, under which the drain should have been constructed; and in consequence of the award not being carried out the plaintiff sustained damages, and should have been awarded the same at the trial or by a reference to ascertain them.

The motion was argued before Armour, C.J., and Falconbridge, J., on the 15th February, 1889.

Aylesworth (with him N. Mills), for the plaintiff. The Ditches and Watercourses Act of 1883 was the one in force when the award was made. It is said that the plaintiff's only remedy is under section 13\* of that Act (section 15 of R. S. O. 1887, ch. 220); but that provides only for the building of

\*13. The engineer shall, at the expiration of the time limited by the award for the completion of the work, inspect the ditch or drain, if required in writing so to do by any of the parties interested, and if he finds the work or any portion thereof not completed in accordance with the award, he may let the same, in sections, as apporportioned in the award, to the lowest bidder therefor, taking such security for the performance thereof within the time to be limited, as he may deem necessary, but no such letting shall take place till after four clear days' notice in writing of the intended letting has been posted in at least three conspicuous places in the neighbourhood of the work, and notice thereof is sent by registered letter to such parties interested in said award as are non-resident in said municipality, but if the engineer is satisfied of the bona fides of the persons doing the work, and there is good reason for the non-completion thereof, he may, in his discretion, extend such time.

the drain, not for compensation or redress for actual damages already suffered. *O'Byrne vs. Campbell* (1) shows that this action lies. On the evidence given by the plaintiff the case could not have been withdrawn from a jury. The plaintiff is entitled to the relief which he asks, a declaration of his right to have the water flow through the lands of the defendants, and a mandatory order to have the work completed, as well as damages.

W. R. Meredith, Q.C., for the defendants the township of Orford and the defendant Campbell. The plaintiff has no remedy by action. Without the statute the plaintiff would have no right to have the water carried over the defendants' lands, and so his rights are entirely governed by the statute. I refer to *Murray vs. Dawson* (2).

McKillop, for the defendant McKillop.

Charles MacDonald, for the defendant Allison.

Aylesworth, in reply.

June 27, 1890. The judgment of the Court was delivered by Armour, C.J.:—

I do not agree with the conclusion arrived at by the learned Judge at the close of the plaintiff's case upon the facts then proved, but I think that sufficient was proved in the plaintiff's case to compel the defendants to go into evidence in their defence, and consequently I would be in favour of granting a new trial were we of opinion that this action was maintainable in point of law.

The award was made under the "Ditches and Water-courses Act, 1883," and we think that the only remedy open to the plaintiff for the work not being completed in accordance with the award, which is what he complains of in his statement of claim, was the remedy provided by section 13 of that Act.

We think that this case is governed by *Murray vs. Dawson* (3), and is not distinguishable in principle from it, and

it was not intended by anything that was said in *O'Byrne vs. Campbell* (4) to affect the principle so laid down.

We think, therefore, that this action must be dismissed; but as this question might have been raised by demurrer without the expense of a trial, no other or greater costs will be taxed to the defendants than would have been taxed to them had they simply demurred to the statement of claim and the demurrer had been decided in their favour; and whether or not there should be only one set of costs we leave to the taxing officer.

Falconbridge, J.:—

I agree that plaintiff's only remedy is that provided by section 13 of the "Ditches and Watercourses Act, 1883," and I concur in my lord's disposition of the motion.

## IN THE HIGH COURT OF JUSTICE.

[QUEEN'S BENCH DIVISION.]

YORK ET AL. vs. TOWNSHIP OF OSGOODE ET AL.

(Reported 24 Ont. Rep. 12.)

*Waters and Watercourses—Ditches and Watercourses Act—Award—Affirmance by County Judge—Jurisdiction of Engineer of Municipal Corporation—Determination by Court—Requisition—Assent of Majority of Owners—Notice—"Owner," Meaning of—Tenant at Will—Benefit from Work to be Done under Award—Notice of Letting Work—Time.*

1. Where the engineer of a municipal corporation purports to make an award under the Ditches and Watercourses Act with respect to the making of a drain, the affirmance of such award by the County Court Judge does not preclude the High Court from entertaining the objection that the engineer had no jurisdiction to make the award; nor is such an objection one for the determination of the County Court Judge alone.

*Murray vs. Dawson*, 17 C. P. 588, distinguished.

2. In the absence of a resolution of the municipal council such as is provided for by section 6 (b) of the Ditches and Watercourses Act, R. S. O. ch. 220, the question whether the engineer has jurisdiction to make an award depends upon whether, before filing the

requisition, the owner filing it has obtained the assent in writing of a majority of the owners affected or interested, as provided by section 6 (a); if he has obtained such assent, the engineer is immediately upon such filing clothed with jurisdiction; and the absence of the notice (Form D.) required by section 6, would not deprive him of such jurisdiction, but would form only a ground of appeal against his award.

3. The assent of the municipal corporation as one of the landowners interested may be shown by resolutions passed by the council directing the engineer to proceed with the work.
4. The term "owner" as used in the Act means the assessed owner; and a tenant at will may be an owner affected or interested within the meaning of the Act.
5. The decision of the County Court Judge as to matters over which the engineer has jurisdiction cannot be reviewed by the Court; and whether the plaintiffs were benefited by the proposed work was a matter to be determined by the engineer and the subject of appeal to the County Court Judge.
6. The mere publication by the engineer, within a year after the affirmance of an award, of a notice that he would let the work to be done upon the land of one of the persons affected by the award, and that such letting would take place after the expiry of a year from such affirmance does not afford any ground for an action of trespass.

This was an action brought by James York the elder, James York the younger, and Isaac York, against the municipal corporation of the township of Osgoode, John Bower Lewis, and certain other persons who were the owners of lands in the 6th concession of that township, with respect to a certain ditch or drain proposed to be constructed, under the Ditches and Watercourses Act, through lands in the 6th and 7th concessions of the township.

The plaintiffs alleged that they were the owners of certain lands in the 6th concession; that the defendants, the township corporation, had jurisdiction over the highway between the 6th and 7th concessions; that the defendant Lewis was the township engineer; that the defendants George Comrie and William Comrie were not the owners of any lands in the township; and that the other defendants were the owners of certain lands in the 6th and 7th concessions.

The plaintiffs further alleged that the defendant George Comrie, on the 25th August, 1891, filed with the clerk of the township a requisition for the construction of a ditch or drain through certain specified lands, which requisition was



signed by William McRostie, George Comrie, Hugh McAlindon, George Popham, James McCurdy, and William Comrie, and designated, as the lands through which it would be necessary to continue the ditch, the lands of the six persons signing the requisition, and the lands of the plaintiff James York the elder, John Carson, Mrs. Peter McRostie, and the township corporation as owners of the highway.

The plaintiffs further alleged that the defendant Lewis, as engineer, had made an award with respect to the proposed ditch, from which the plaintiff James York the elder had appealed to the County Judge, who had confirmed it except as to the time of doing the work under it.

The plaintiffs complained that their lands would not be benefited by the making of the proposed ditch; that the plaintiffs James York the younger and Isaac York were not mentioned in the award, nor were their lands or those of their co-plaintiff declared to be benefited by the proposed drain, yet they were held liable to make part of the drain, and their lands were burdened therewith; that the defendant George Comrie never was the owner of any land in the 6th or 7th concession, and had no authority to originate the requisition or to be a party to it or to the award; that the assent in writing of a majority of the owners affected or interested was never obtained to the construction of the ditch; and that the award was bad because it did not specify the locality, description, and course of the ditch or drain, nor the portion thereof to be done by the respective owners.

And the plaintiffs claimed: (1) A declaration that the defendant Lewis had no jurisdiction to make the award, and that the County Judge had no jurisdiction to make any order in appeal confirming the same, and that the award and order were null and void. (2) A declaration that the alleged award and Judge's order were not binding on the plaintiffs, or on any or either of them, and that they or any of them were not bound to make any part of the drain. (3) A declaration that the alleged award was not binding on the lands of the plaintiffs mentioned therein, or on any of them. (4) A

declaration that the defendant Lewis was not entitled to let the construction of the drain mentioned in the alleged award on the 28th October, 1892. (5) An injunction restraining the defendants from letting or constructing the work at the expense of the plaintiffs, or entering upon the lands of the plaintiffs, and restraining the defendants the township corporation from paying therefor or assessing the cost thereof against the lands of the plaintiffs. (6) Damages respectively for any trespass the defendants, or any of them, might commit on the lands of the plaintiffs in or about the construction of the drain, and for any injury they might respectively suffer from the construction of the drain. (7) And such further and other relief as to the Court should seem meet.

The defendants alleged that the defendant George Comrie was the owner of lot 27 in the 7th concession, and admitted that he had filed the requisition as alleged by the plaintiffs.

They further alleged that all the proceedings for the making of the award were had and taken as required by the Ditches and Watercourses Act; that the award was properly made, and the order of the County Judge was finally conclusive and binding upon the parties, and the plaintiffs were estopped by it, and they submitted that the action was not maintainable.

Issue was joined upon the defence.

An application was made by the plaintiffs for an interim injunction, which was granted, and upon motion to continue it the following judgment was delivered:

November 16, 1892. Galt, C.J.:—

This was a motion to continue an interim injunction granted by the Judge at Ottawa.

Aylesworth, Q.C., for the motion.

Henderson, contra.

On the motion being reached, Mr. Henderson took the preliminary objection that this action did not lie, or rather that the rights of the parties were concluded by the finding of the learned County Judge on the award of the engineer.

These proceedings were taken under the provisions of ch. 220, R. S. O., "An Act respecting Ditches and Watercourses." The plaintiffs are the father and two sons. Shortly before these proceedings commenced the father had conveyed the portions of the lands affected to his sons. All the preliminary steps were done with his knowledge, he was examined as a witness before the engineer, and was the appellant before the County Judge under section 11. The learned Judge heard the appeal and affirmed the award, with the exception of two pieces of land, which he decided in favour of the appellant James York. This judgment was given on 31st October, 1891.

By section 11, sub-section 4, "The Judge shall hear and determine the appeal or appeals, and set aside, alter or affirm the award, correcting any error therein, and he may examine parties and witnesses on oath, and, if he so pleases, inspect the premises, requiring the attendance with him of the engineer, and may order payment of costs by the parties, or any of them, and fix the amount of such costs."

It appears to me the contention of Mr. Henderson is correct; under the express words of the statute the Judge is to determine the appeal; and no appeal lies from this decision.

Motion refused with costs to be costs to the defendants in any event.

Thereafter the cause was tried at the Spring Sittings, 1893, of this Court at Ottawa, by Falconbridge, J.

It appeared that the plaintiff James York the elder, on or about the 20th day of October, 1888, as the owner of the west half of lot 28 in the 7th concession and of the north half of lot 27 in the 6th concession of the township of Osgoode, gave notice to the township clerk that he required to construct a ditch or drain through said lots, and found it necessary to continue the same through the land of the township, being road allowance and lots 26 or 27 in 6th concession of the township of Osgoode, under the Ditches and Watercourses Act, 1883, and requested that he would attend a friendly

meeting on the road opposite lot 27 on the 6th day of November, 1888, at the hour of two p.m., with the object of agreeing, if possible, upon the respective portions of such ditch or drain to be made, deepened, or widened by the several parties intersted. That on or about the 13th day of December, 1888, the plaintiff James York the elder gave notice to the clerk of the township of Osgoode, by way of requisition, according to the form C. to the Ditches and Watercourses Act of 1883, that, as the owner of the west half of lot 28 in the 7th concession of the said township, he required to construct a ditch or drain through said lot, and it would be necessary to continue the ditch or drain through the following lands, namely, road allowance and lots numbers 26, 27, or 28 in the 6th concession of Osgoode, and having failed to agree upon the respective portions to be made by each, they required the engineer appointed by the municipality for the purpose to attend at the locality of said proposed ditch or drain on the 21st day of December, 1888, at the hour of 8 a.m., examine the premises, hear the parties and their witnesses, and make his award under the provisions of the Ditches and Watercourses Act, 1883, which notice or requisition was signed by the said James York the elder, the said William Comrie, and the said William McRostie.

That on the 15th day of December, 1888, the council of the said township passed the following resolution: "That the application of James York and others requiring the township engineer to attend for the purpose of examining and laying out a ditch or drain across lots 26, 27, and 28. 6th concession be granted; that so soon as an engineer is appointed by this council, that the clerk notify him to attend in accordance with said application." That on the 8th day of July, 1889, a by-law was passed by the said council appointing Albert Helmer engineer for the township of Osgoode under the Ditches and Watercourses Act; that on the 18th day of August, 1890, the council of the said township passed the following resolution: "That the township engineer be authorized to report to this council in accordance with instructions heretofore given to him on the advisability of open-

ing a ditch or drain under the Ditches and Watercourses Act, commencing on or about the side line between lots 27 and 28 in the 7th concession of the township of Osgoode, and running in a north-westerly direction until a proper outlet is reached, and that the clerk forward a copy of the same to the engineer." That on the 29th day of October, 1890, the said engineer made a report to the said council with profiles *re* James York ditch. That on the 22nd day of December, 1890, the said council passed the following resolution: "That the clerk notify Albert Helmer, township engineer, to take steps necessary for the purpose of making a proposed ditch, asked for by James York and others, between the 6th and 7th concessions, in accordance with plans placed before this council, and make his award accordingly." That the township engineer did nothing further in the matter, and on the 16th day of April, 1891, the resignation of the said Albert Helmer as township engineer was accepted, and a by-law was passed appointing the defendant John Bower Lewis engineer for the township of Osgoode, under the Ditches and Watercourses Act, and on the 4th day of May, 1891, he accepted the appointment. The township clerk stated that he served the defendant Lewis with a copy of the resolution as to the original survey of Mr. Helmer, but that the defendant Lewis thought it would be better to file the requisition also, on account of so much time elapsing between the time of the passing of the resolution and his acting on it, and it would be safer to have a requisition also. It appeared also that the township clerk, having been applied to for the purpose of ascertaining whether there had been a resolution passed by the council, wrote the following letter: "This award was made on the requisition of George Comrie and others; consequently there was no resolution passed by the council in connection with it."

It appeared that upon receiving the requisition the defendant Lewis appointed the 4th day of September, 1891. at 8 a.m., went to the locality and, having heard the parties present, namely, George Comrie, William Comrie, James York, William McRostie, and James McCurdy, made his

award. It also appeared that the notice in writing Form B, provided for by the 5th section of the Ditches and Water-courses Act, was served as therein required upon the plaintiff James York the elder, and that a meeting was held in pursuance thereof at which he, William McRostie, George Comrie, and Hugh McAlindon were present, and they not agreeing, he was asked to sign the requisition, but he refused. It did not appear that any notice in writing in the form D, or to the like effect, provided for by the 6th section of the said Act, was served as therein required. It appeared that on the 17th day of December, 1890, the plaintiff James York the elder conveyed to his son James York, the north half of lot No. 27 in the 6th concession of the said township, and to his son Isaac York the south half of lot No. 26 in the 6th concession of the said township, which conveyances were registered on the 3rd day of March, 1891; that these sons, who were unmarried men, continued to live with their father as theretofore; that he was assessed for these lands in the year 1891 as theretofore; and these lands were worked with their father's land in the same manner as theretofore; and that apparently there had been no change of possession of these lands, nor was it the fact that these conveyances had been made known in the neighbourhood; that the father and both these sons knew beforehand of the time appointed by the defendant Lewis for his attendance, and the father and the son Isaac were both present when the defendant Lewis was laying out the ditch, and the son Isaac was assisting the defendant Lewis in laying it out. That neither the father nor either of the sons informed the defendant Lewis that the sons had become the owners of the lands so conveyed; that when the father appealed from the ward both these sons were aware of his doing so, and the father and these two sons were present when the Judge of the County Court came upon the ground and when he heard evidence in respect of the appeal; that the notice of appeal given by the plaintiff James York the elder was on the following grounds: (1) That the award was contrary to law and evidence. (2) That the engineer had no jurisdiction to make the award. (3) That the

owners and occupiers of the land affected were not notified of the time when and the place where the parties interested were to meet. (4) That the appellant was not notified of the time and place of meeting when the engineer attended to examine the premises in question. (5) No requisition describing the ditch or drain had been filed with the clerk of the municipality. (6) The assent in writing of a majority of the owners affected by or interested in the said alleged ditch had not been obtained thereto. (7) No resolution of the council approving of the scheme had been passed. (8) The appellant was not the owner of the lands on which the proportion of the proposed ditch to be constructed by him was calculated. (9) The proportion assigned to the appellant was unjust and inequitable, and it imposed on him a larger portion of work than the benefit he derived would warrant. (10) The course of the drain laid down in the alleged award was unjust to the appellant, in as far as the north half of lot No. 27 in the 6th concession was concerned. (11) The proceedings required by the Ditches and Watercourses Act had not been taken. (12) The award was unjust and inequitable, and had not been made in accordance with the Ditches and Watercourses Act. (13) The costs of the engineer were excessive and were not proportionately assigned to the interested parties according to the benefit to be derived.

It appeared that it was not till this action was brought that anything was said by the father or the two sons about the said conveyances from the father to them. It appeared that the defendant William Comrie was the patentee of the Crown of the west half of lot No. 27 in the 7th concession of the said township; that about six years before the trial of this action he put his son, the defendant George Comrie, into the sole possession of the south half of the said west half, telling him that he would give it to him, and to go in and make whatever use he wanted to of the place; that the defendant George Comrie had ever since enjoyed the fruits of it for his own use, and had paid the taxes upon it, and his father had not since that time interfered with his use of it. The defendant William Comrie was examined as a witness and

said that he had given the south half of the said west half of lot 27 in the 7th concession of the said township to his son, the defendant George Comrie, about six years before the trial; that since that he had nothing whatever to do with it; that he was prepared to give him a deed for it whenever he wished; that his son had put up a barn upon it about two years before the trial, and had put up a dwelling house upon it and had got married and moved into it a year ago before last Christmas; that his son had put buildings on it worth from \$1,000 to \$1,200; and he certainly would not wrong him in it.

The learned Judge gave the following judgment:—

May 12, 1893. Falconbridge, J.:—

In this case I follow the considered judgment of Sir Thomas Galt, C.J., on the motion to continue the injunction, and hold that the rights of the parties were concluded by the finding of the learned County Judge on the appeal.

The father did appeal, and the sons were in substance parties and are also bound.

The action will be dismissed with costs.

On the question of a trial Judge holding a question of law to have been disposed of by the Judge who has heard a motion for injunction, I refer to the expressions of Van-koughnet, C., in *Weir vs. Mathieson* (1). See also *McGee vs. Kane* (2).

At the Easter Sittings of the Divisional Court, 1893, the plaintiffs moved to set aside this judgment, and to enter judgment for the plaintiffs for a declaration that the alleged award was not binding on the plaintiffs or on their lands, and for an injunction against the defendants trespassing on the plaintiffs' lands, and against the making or letting of the work under the said award, or that a new trial might be granted, on the following amongst other grounds:—

(1) That the defendant engineer had no jurisdiction to make the alleged award, the majority of owners affected or interested not having assented thereto, and the promoter of

(1) 11 Gr. at p. 390 sub fin.

(2) 14 O. R. 226.



the scheme not being an owner of any land benefited or mentioned in the award. (2) That the engineer having determined that only two persons (both defendants) were benefited by the drain, he had no jurisdiction to impose on the plaintiffs and their lands the burden of making the greater part of it. (3) That no notice of the proposed proceedings was given to the plaintiffs or to any of them. (4) That the alleged award orders the construction of ditches (not mentioned in the requisition) and the deepening and widening of ditches already made (not mentioned in the requisition) and purports to assess the plaintiffs and their lands for the cost of the same. (5) That the alleged award is too indefinite, as the drain to be constructed between stakes A. and B. across the south half of lot 28 in the sixth concession is left to the will of the owner, as is the drain between stakes 8 and 11. (6) That the defendants trespassed on the plaintiffs' lands and threatened to continue to do so on the 28th day of October, 1892, although the engineer had no authority to inspect the ditch or let the work at that time. (7) That the learned Judge was wrong in accepting as final the interlocutory judgment of his Lordship Chief Justice Galt, and in holding that the judgment of the County Court Judge determined the question as to the validity of the alleged award.

On the 26th May, 1893, the motion was argued before Armour, C.J., and Street, J.

Aylesworth, Q.C. (with him D. B. MacTavish, Q.C.), for the plaintiffs. We contend that, without jurisdiction to make an award, one has been made which is void. The proposition to make the ditch was solely in the interest of two land-owners, while it involved crossing the lands of a dozen. There was no jurisdiction to start upon the enterprise at all. This Court should not abrogate its powers. It has inherent jurisdiction. We bring trespass, the defendants justify under the award, and the Court must determine the validity or invalidity of the award. The award does not find that the plaintiffs will be benefited by the proposed drain. If people are not found to be benefited, they cannot be made to pay: secs.

4, 5, and 6 of the Ditches and Watercourses Act, R. S. O. ch. 220, as amended by 52 Vict. ch. 49. The engineer finds only lot 27 in the 7th concession and half of 28 in the 6th to be benefited. The defendant George Comrie was not an owner, and he was the requisitioner under sec. 6. The assenting owners were not a majority of the owners under sub-sec. (a) of sec. 6. Six out of twelve cannot impose upon the other six the right to cross their lands, and the burden of doing part of the work. No proper notice was given; the statute is very careful to require written notice: 52 Vict. ch. 49, sec. 2 (O.). No formal notice was given at all. The award is not sufficiently definite under sec. 8 of R. S. O. ch. 220. I refer to *Dawson vs. Murray* (3), *Murray vs. Dawson* (4), *Berkeley vs. Elderkin* (5). The question of jurisdiction could not be raised before the County Judge: *Re Anderdon and Colchester* (6), *Hepburn vs. Orford* (7), *O'Byrne vs. Campbell* (8), *Regina vs. Malcolm* (9). The notice given by the engineer as to the letting of the work, after the expiry of a year from the County Judge's order, is sufficient to give the plaintiffs a right of action.

G. F. Henderson, for the defendants. The County Judge had jurisdiction and his determination is final and conclusive: *Murray vs. Dawson* (10), *Short vs. Palmer* (11), *Re Cameron and Kerr* (12), *Re Roberts and Holland* (13), *Vestry of St. Pancras vs. Batterbury* (14), *Great Northern S.S. Fishing Co. vs. Edgell* (15), *Regina vs. County Court Judge of Essex* (16). The evidence of waiver is undoubted; the absence of preliminaries may be waived: *Moore vs. Gamgee* (17). All the questions now raised were raised before the County Judge. The defendant Lewis, the engineer, should have received notice of action.

(3) 29 U. C. R. 464.

(4) 17 C. P. 588, 19 C. P. 314.

(5) 1 E. &amp; B. 805.

(6) 21 O. R. 476.

(7) 19 O. R. 585.

(8) 15 O. R. 339.

(9) 2 O. R. 511.

(10) 17 C. P. 588.

(11) 24 U. C. R. 633.

(12) 25 U. C. R. 533.

(13) 5 P. R. 346.

(14) 2 C. B. N. S. 477.

(15) 11 Q. B. D. 225.

(16) 18 Q. B. D. 704.

(17) 25 Q. B. D. 244

Aylesworth, in reply. Notice of action is not necessary where the claim is not for damages; the question, at all events, is not raised in the pleadings. It is not necessary, nor do the plaintiffs desire, to review the decision of the County Judge.

June 10, 1893. The judgment of the Court was delivered by

Armour, C.J.:—

The decision of this case rests mainly upon the question whether the engineer had jurisdiction to make the award.

If he had no jurisdiction to make it, the affirmance of it by the County Judge could not remedy the defect, for if he had no jurisdiction to make it, it was void, and the affirmance of it by the County Judge could not give it validity.

To hold that it could, would be to determine that the validity of the award of an engineer which was made by him without jurisdiction, would depend upon whether it was appealed from to the County Judge or not.

If not appealed from, it would be invalid; if appealed from it would be valid.

We are, no doubt, bound by the decision in *Murray vs. Dawson* (18); but there is nothing in that decision which determines that, where there is no jurisdiction to make the award, the affirmance of it by the County Court Judge precludes this Court from entertaining the objection, or that such an objection is for the determination of the County Court Judge alone.

We think, therefore, that the question as to whether the engineer had jurisdiction to make this award was clearly open to the plaintiffs to raise in this suit.

Whether the engineer had jurisdiction to make the award in question depended upon whether, before filing the requisition, the owner filing it had obtained the assent in writing thereto of, including himself, a majority of the owners affected or interested; if he had not obtained such assent,

the engineer had no jurisdiction, for it is clear that no such resolution was passed by the council as is provided for by sec. 6 (b) of the Ditches and Watercourses Act. But if the owner filing the requisition had obtained such consent in writing, the engineer was, immediately upon such filing, clothed with jurisdiction; and the absence of the notice in writing (Form D) required by the 6th section to be given, not by the engineer, but by the owner filing the requisition, would not deprive him of such jurisdiction, but would form only a ground of appeal against his award.

The question, therefore, is reduced to this:—Did the owner filing the requisition first obtain the assent in writing thereto of, including himself, a majority of the owners affected or interested?

Now, the owners affected or interested were George Comrie, who filed the requisition, William Comrie, James York (and James York the younger and Isaac York, if they are to be counted), George Popham, William McRostie, Hugh McAlindon, John Carson, James McCurdy, Mrs. Peter McRostie, and the corporation of the township of Osgoode—twelve in all.

Of these, six signed the requisition, namely, George Comrie, William Comrie, George Popham, William McRostie, Hugh McAlindon, and James McCurdy; and I think that the resolutions passed by the council of the corporation of the township of Osgoode, above set out, shew a sufficient assent on the part of that corporation to satisfy the statute.

It is not disputed that all those who signed the requisition with the exception of George Comrie, were owners; but as to him the contention is that he was not an owner, and so the assent in writing of a majority of the owners affected or interested was not obtained.

It thus becomes material to ascertain what is meant by the term "owner" as used in the Ditches and Watercourses Act.

The term "owner" has no definite legal meaning, and has been construed differently in different Acts of Parliament in which it has been used, and has been so construed to

meet the intention of the legislature as gathered from the particular Act in which the term has been used.

In Stroud's Judicial Dictionary it is said that "the owner of a property is the person in whom (with his or her assent) it is for the time being beneficially vested, and who has the occupation, or control, or usufruct of it;" and numerous cases are referred to as shewing the meaning attached to the term under various Acts of Parliament. See particularly *Lewis vs. Arnold* (19), *Woodard vs. Billericay Highway Board* (20).

There are several cases in our own Courts where the meaning of the term has been discussed, as in *Conway vs. Canadian Pacific Railway Co.* (21), *Hopkins vs. Provincial Insurance Co.* (22), *Lyon vs. Stadacona Insurance Co.* (23).

The defendant George Comrie was at least a tenant at will, and as such was an owner affected or interested within the meaning of the Act, and was making himself liable as such for the proportion of the work he might be awarded to perform.

I think, moreover, that the meaning to be ascribed to the term "owner" in this Act is, the assessed owner, the person appearing by the assessment roll to be the owner; for it never could have been intended that in a proceeding such as this, under this Act, there should be an inquiry as to the title of the apparent owners of the lands affected by the proposed work, and that a proceeding such as this should be set at naught by the appearance after the whole proceeding was at an end of persons who were not assessed claiming to be persons affected or interested by or in the work awarded to be done. And I do not think that James York the younger and Isaac York ought to be reckoned as owners within the meaning of the Act, for they were not assessed, but their father was, for the lands he had conveyed to them, at the time this award was made.

Unless this meaning is to be given to the term "owner" as used in this Act, I do not see how the provisions of the

(19) *L. R.* 10 Q. B. 245.

(20) 11 Ch. D. 214.

(21) 7 O. R. 673.

(22) 18 C. P. 74.

(23) 44 U. C. R. 472.

Act, sec. 9, sub-sec. 2, and of secs. 14 and 18, could be carried out.

I am of opinion, however, that whether the term "owner" means the assessed owner or not, George Comrie was an owner within the meaning of the Act.

Whether the plaintiffs were benefited by the proposed work was a matter to be determined by the engineer, and was the subject of appeal to the County Court Judge under the Act, and his decision as to matters over which the engineer had jurisdiction cannot be reviewed by us.

The award is, in my opinion, sufficiently definite, and sufficiently complies with the provisions of sec. 8 of the Act; and under the amended award the privilege granted to the plaintiff James York the elder by the award of the engineer as to the digging of the ditch from stake 8 to stake 11 is, in my opinion, abrogated.

It was contended that, under any circumstances, the plaintiffs were entitled to maintain this action, because the engineer gave notice on the 28th day of October, 1892, within a year from the affirmance of the award by the County Court Judge, that he would let the work which by the amended award was to be done by the plaintiff James York the elder, and such letting would take place on the 3rd day of November, 1892, which was after the expiry of a year from such affirmance; but we do not think the mere publication of this notice within the year afforded any ground for such an action as this.

The motion will be dismissed with costs.

## IN THE COURT OF APPEAL FOR ONTARIO.

YORK ET AL. vs. TOWNSHIP OF OSGOODE ET AL.

(Reported 21 O. A. R. 168.)

*Waters and Watercourses—Ditches and Watercourses Act—R. S. O. ch. 220—"Owner"—Tenant at Will.*

The word "owner" as used in the Ditches and Watercourses Act, R. S. O. ch. 220, means the actual owner and not the assessed owner; and a tenant at will of land affected, assessed as owner, is not an owner affected or interested within the meaning of the Act.

Judgment of the Queen's Bench Division, 24 O. R. 12, reversed.

This was an appeal by the plaintiffs from the judgment of the Queen's Bench Division, reported 24 O. R. 12.

The action was brought to restrain the defendant township from enforcing an award purporting to be made by the defendant Lewis as township engineer under the provisions of the Act respecting Ditches and Watercourses, R. S. O. ch. 220, and from constructing through the lands of the plaintiffs the drain therein mentioned. The facts are very fully stated in the report below, the legal question being the meaning to be given to the word "owner" as used in the Act. The plaintiffs contended that only actual owners had a voice in deciding as to the construction of a drain, while the defendants contended that the persons assessed as owners were entitled to decide and this construction was adopted by Falconbridge, J., at the trial, and by the Queen's Bench Division.

The plaintiffs' appeal was argued before Hagarty, C.J.O., Burton, Osler, and MacLennan, J.J.A., on the 15th and 16th of March, 1894.

Moss, Q.C., and MacTavish, Q.C., for the appellants. The power to cause drains to be constructed, and thus adversely to create easements, can be exercised only by a majority of the actual owners of the lands affected, and there was not a majority of actual owners in favour of this scheme. An occupant of land, to whom the owner has promised to give or devise it, cannot be counted as an owner. No will or

deed has been made, and title cannot be made by mere delivery of possession. The promise is besides vague and indefinite, and incapable of enforcement. The assessment roll is not the proper test of ownership. The proceedings affect only the owners and are confined to them, though when the proceedings are concluded the aid of the municipality may be invoked for such subsidiary purposes as are referred to in sections 9 and 18. The Legislature has drawn a distinction between owners, tenants and occupants, and has thus recognized the usual interests in land, and when it declared that the consent of a majority of the owners interested was necessary, it clearly referred to those having the fee in the lands. The statute must be construed strictly, and its provisions implicitly followed: *Hus vs. School Commissioners* (1), *Lewis vs. Arnold* (2), is relied on by the Queen's Bench Division, but this case has been overruled by *Sale vs. Phillips* (3). And see *Regina vs. Lee* (4), *Regina vs. Swindon Local Board* (5), *Regina vs. Vestry of St. Marylebone* (6),

*Shepley, Q.C.*, and *G. F. Henderson*, for the respondents. Owner means owner within the meaning of the Assessment Act which is in *pari materia* with this Act, and admittedly there was a majority of the assessed owners in favour of the work. The word has in itself no definite legal meaning, and in dealing with an Act such as this is, admittedly passed in the interest of those who desire to cultivate land, it should be interpreted to mean the persons having the actual beneficial usufruct: *Miller vs. Grand Trunk R. W. Co.* (7), *In re Roberts and Holland* (8), *Regina vs. Swalwell* (9), *Hughes vs. Sutherland* (10), *Woodard vs. Billericay Highway Board* (11), *Prescott Election Case* (12). Unless the Act be so construed the provisions for collecting the cost in the same way as taxes would be meaningless.

*Moss, Q.C.*, in reply.

(1) 19 S. C. R. 477.

(2) L. R. 10 Q. B. 245.

(3) [1894] 1 Q. B. 349.

(4) 4 Q. B. D. 75.

(5) 4 Q. B. D. 305.

(6) 20 Q. B. D. 415.

(7) 45 U. C. R. 222.

(8) 5 P. R. 346.

(9) 12 O. R. 391.

(10) 7 Q. B. D. 160.

(11) 11 Ch. D. 214.

(12) *Hodgins*, 1.



April 16th, 1894. The judgment of the Court was delivered by

Osler, J.A.:—

The broad question is as to the jurisdiction of the engineer to make the award, and this depends upon whether the landowner, who filed with the clerk of the municipality the requisition for the construction of the drain, had first obtained the assent in writing thereto of (including himself) a majority of the owners affected by or interested in the proposed drain, as required by section 6 (a) of the Act.

Some steps had been taken by the plaintiff James York, Sr., and two other persons, as far back as October and December, 1888, with the object of having a drain constructed on some of the lands affected by the award in question, but no effective requisition had been filed under section 6 (a), or resolution passed by the council under section 6 (b) after notice to the parties interested. These proceedings were in my opinion, entirely abandoned, and cannot be regarded as forming any part of the foundation of the award, nor does the award profess to be based upon them, or upon anything but the owner's requisition bearing date the 25th August, 1891, filed with the clerk pursuant to the Act. As to this part of the case I agree with the opinion of the Court below.

The requisition was signed by six persons: Wm. McRostie, George Comrie, Hugh McAlindon, George Popham, James McCurdy and William Comrie. Other owners of lands affected were James York, Sr., John Carson, the municipality of the township of Osgoode, and Mrs. Peter McRostie. Two others, making twelve in all, were the plaintiffs James York, Jr., and Isaac York, but they have been rejected, and held not to be owners within the meaning of the Act, for the purpose of ascertaining whether the requisition was sufficiently signed.

The plaintiffs contend that they were owners, and ought to have been counted.

They also contend that George Comrie was not an owner and ought not to have been counted, and further that the

Court below were wrong in holding that the township of Osgoode were assenting parties to the requisition.

That James York, Jr., and Isaac York, were owners in fee simple of part of the lands affected by the drain there can be no question, nor that they became such by conveyances thereof from their father, the plaintiff James York, Sr., made on the 17th December, 1890, and duly registered in the county registry office on the 3rd March, 1891. In their case no question arises as to what quantum of interest will constitute an owner within the meaning of the Act. They were owners not only when the award was made, but long before the proceedings on which it is based were initiated. The ground on which they have been held to be excluded from an owner's right to control or take part in such proceedings is, that the meaning to be ascribed to the term "owner" in the Act is "assessed owner," the person appearing by the assessment roll to be the owner, and that they were not assessed for the year 1891, but their father was, for the lands he had conveyed to them in the previous December. I am unable, with all deference, to subscribe to this limitation of the meaning of the term owner. It seems to me to savour more of legislation than of interpretation; the Act does not define the meaning of the term, nor has it adopted the limitation found in the drainage clauses of the Municipal Act, R. S. O. ch. 184, sec. 569, where the persons who may set the council in motion are the majority in number of the persons as shown by the last revised assessment roll to be the owners, whether resident or non-resident, of the property to be benefited. If the Legislature had meant that the persons to control or initiate the proceedings under the Ditches and Watercourses Act should be the persons who were assessed as owners, it would have been easy to say so, but as they were dealing with drains extending over a comparatively limited area where owners of the property affected were known to each other, or could readily be ascertained, it was probably thought unnecessary to give an arbitrary meaning to the word. Moreover, in the case of non-resident owners whose names do not happen to have been entered upon the assessment roll, the

real owner must be discovered and dealt with as provided in section 19, and there seems no reason why in other cases proceedings which may result in establishing in invitum an easement over the land through which the drain passes, binding upon privies in estate as well as parties—*Kelly vs. O'Grady* (13)—should not be taken by or against the real owner of the land, whatever may be the extent of the interest sufficient to confer that status.

It does not appear to me that there is anything in section 9, sub-sec. 2, section 14 and section 18 of the Act, which are relied on by the Court below as compelling the interpretation they have placed upon the word, inconsistent with the view that ownership for the purposes of the Act is not controlled by the assessment roll, or which makes it difficult to carry out the provisions of those sections if the other view of the meaning of the term is adopted. Section 9 deals with the case of a contract for rock-cutting, given out by the engineer, instead of requiring each person benefited to do his share of the work. The engineer is to determine the sum to be paid by each of the persons benefited, which, unless forthwith paid, "shall be added to the collector's roll, . . . and shall thereupon become a charge against the lands of the parties so liable."

Section 14 appears to provide for the case of payment by the municipality of the fees of the engineer, and of any fees or costs awarded or adjudged to any person; and provides that unless the same be forthwith repaid by the person awarded or adjudged to pay the same, the municipality shall place them on the collector's roll as a charge against the lands of such person, and they shall thereupon become a charge upon land and be collected as ordinary taxes.

Section 18 contains similar provisions with regard to fees and sums of money which may become payable in respect of other works ordered by the engineer in connection with the drain.

None of these sections refer to the persons who are entered on the assessment roll in respect of the land. The

persons liable to pay the sums of money and fees therein mentioned are evidently intended to be entered therefor nominatim upon the collector's roll.

It is from them that such moneys are to be collected, and it is their lands which are charged in default of payment. Whether they are the assessed owners, or the real owners though not assessed, can make no difference; they have no reason to complain. It is the land which it is ultimately charged in either case, and it has not been suggested how any complication or difficulty is likely to arise.

James York, Jr., therefore, and Isaac York, must be regarded as owners of lands affected, for the purpose of these proceedings.

The next question is, whether George Comrie was such an owner of the lot in respect of which he signed the requisition.

The Act, as I have said, contains no definition of the word "owner;" the meaning must, therefore, depend upon the subject matter and the context. Here, I think, when it is considered that proceedings taken under the Act may result in what has been described as the grant of an easement over the land, the word is intended to mean, at the lowest, a person who has a real and substantial interest in the land, possibly something less than the fee simple, but certainly more than that of a mere occupier or tenant at will. The owner may be bound by notices served upon the occupant as the 19th section provides, but there is nothing in the 6th section which enables the latter to confer jurisdiction upon the engineer by the initiatory requisition and assent. In such cases as *Lewis vs. Arnold* (14), *Woodard vs. Billericay Highway Board* (15), we have illustrations of the extension of the term to embrace smaller interests in property, where the context and subject matter require it, as where the proceedings to be effective at all must be of a prompt and summary character, and would be useless if not applied at once, and to the person in possession. Here the proceedings to be taken

are intended to affect the freehold, and in a permanent manner, and may even result in its being officially sold for non-payment of charges. Where that is the case and where ample means are provided by the Act for notice to parties affected it would be strange if the interest of the owner of the fee could be bound by the action of a person who may have no greater interest than that of a mere possessor or yearly tenant or tenant for a short term of years. So on the other hand it would be inequitable that such a person should be liable to have his name placed on the collector's roll and compelled to pay charges incurred for making what may be a permanent benefit to the property of his landlord.

It appears then that the land of which George Comrie signed the requisition as owner really was the property of his father Wm. Comrie as tenant in fee, and although George Comrie may have had and probably has a very well founded expectation that his father will at some time or other make a gift of it to him by deed or by will, he at present appears to have no better title to it than as tenant at will: Orr vs. Orr (16), Jibb vs. Jibb (17), Maddison vs. Alderson (18).

As such, I am of opinion that he cannot be held to be an owner within the meaning of the Act.

I am also of opinion that even if the municipality are to be regarded in respect of the road as owners of land intended to be affected, they cannot be treated as assenting parties to the requisition on which the engineer acted. No resolution was passed with reference to it, and everything which they did relates to the abandoned scheme, and cannot be invoked to aid or support the subsequent requisition. It follows that that requisition must be held not to have been assented to by a majority of the owners affected or interested; and that the subsequent proceedings were without jurisdiction, as the Court below were of opinion they would in that case be.

I think that nothing has been done by the appellants to estop them from asserting that the engineer's proceedings

were without jurisdiction. They have not permitted any of the work to be done upon their own land, and their opposition to the proceedings throughout has been sufficiently manifest. They are, I am of opinion, entitled to judgment, except as to damages, as prayed for in the statement of claim. There should be no costs against the defendant Lewis.

I refer to the following cases: Hunt vs. Harris (19), Regina vs. Lee (20), Regina vs. Swindon Local Board (21), Regina vs. Vestry of St. Marylebone (22), Sale vs. Phillips (23), Hughes vs. Sutherland (24), Collinson vs. Newcastle, etc., R. W. Co. (25), Schott vs. Harvey (26), Baltimore vs. Boyd (27).

*Appeal allowed with costs.*

(19) 19 C. B. N. S. 13.

(20) 4 Q. B. D. 75.

(21) 4 Q. B. D. 305.

(22) 20 Q. B. D. 415.

(23) [1894] 1 Q. B. 349.

(24) 7 Q. B. D. 160.

(25) 1 C. & K. 546.

(26) 105 Pa. St. 222.

(27) 64 Md. 10.

## THE SUPREME COURT OF CANADA.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

THE CORPORATION OF THE TOWNSHIP OF OSGOODE AND  
OTHERS, (*Defendants*) APPELLANTS,

AND

JAMES YORK, THE ELDER, AND OTHERS,  
(*Plaintiffs*) RESPONDENTS.

(Reported 24 Sup. Ct. R. 282.)

*Municipal Corporation—Ditches and Watercourses Act, R. S. O.  
[1887] ch. 220—Requisition for Drain—Owner of Land—Meaning  
of Term "Owner."*

By section 6 (a) of the Ditches and Watercourses Act of Ontario (R. S. O., [1887] ch. 220) any owner of land to be benefited thereby may file with the clerk of the municipality a requisition for a drain if he has obtained "the assent in writing thereto of (including himself) a majority of the owners affected or interested."

Held, affirming the judgment of the Court of Appeal, that "owner" in this section does not mean the assessed owner; that the holder of any real or substantial interest is an "owner affected or interested"; and that a mere tenant at will can neither file the requisition nor be included in the majority required.

Quære.—If the person filing the requisition is not an owner within the meaning of that term, are the proceedings valid if there is a majority without him?

Appeal from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court (2) in favour of the defendants.

The action in this case was brought for a declaration that an award under the Ditches and Watercourses Act (R. S. O. 1887 ch. 220) was made without jurisdiction because the

(1) 21 Ont. App. R. 168.

(2) 24 O. R. 12.

\* Present:—Sir Henry Strong, C.J., and Taschereau, Gwynne, Sdgewick and King, JJ.

requisition filed was not accompanied by the preliminaries referred to in section 6 of the Act.

The requisition was filed by one George Comrie, and among the lands to be affected by the proposed drain were loss for which the plaintiff James York the elder, was assessed. Some time before the filing of the requisition portions of the last mentioned lots had been conveyed by said plaintiff to James York the younger and Isaac York, who are also plaintiffs in the action, and the question for decision is whether or not the said two Yorks were owners under the Act, and whether or not Comrie was an owner, he being in possession of a part of the land to be affected, but the legal title thereto being in his father. It was admitted that if Comrie was counted in and the two Yorks out there was a sufficient majority under section 6 (a) of the Act for the requisition to be filed.

The Divisional Court held that an owner under the Act was one in whom the property was for the time being beneficially vested, and who had the occupation or usufruct of it, and that George Comrie was such an owner. The Court also held that the assessment roll was also a test of ownership, and James York the elder being assessed for the property conveyed to his sons, the latter were not owners under the Act. The Court of Appeal reversed these holdings and gave judgment for the plaintiffs. The defendants appealed to this Court.

Henderson and MacCracken, for the appellants, referred as to the meaning of owner in the statute to Washburn on Real Property (3), and contended that Comrie was a beneficial owner according to the facts in evidence, citing Dillwyn vs. Llewelyn (4).

O'Gara, Q.C., and MacTavish, Q.C., for the respondents, referred to In re Flatt and the Counties of Prescott and Russell (5).

(3) 4th ed. vol. 3, p. 235.

(4) 4 DeG. F. & J. 517.

(5) 18 Ont. App. R. 1.



1895. March 11. The judgment of the Court was delivered by

Gwynne, J.:—

This appeal must be dismissed. The question is as to the validity of an award purporting to be made by the engineer of the municipality of the township of Osgoode, under the provisions of ch. 220 of the revised statutes of Ontario, entitled "an Act respecting Ditches and Watercourses." The question arises under section 6, sub-sec. *a*, of that Act, whereby it is enacted that where parties interested in a ditch required by an owner of land for the drainage of his land shall not be able to agree upon the proportion to be borne by such owner of land to be benefited by the proposed ditch:

Any owner may file with the clerk of the municipality in which the lands requiring such ditch or drain are situate, a requisition in a form supplied by the Act, shortly describing the ditch or drain to be made, etc., etc., and naming the lands which will be affected thereby and the owners respectively, and requesting that the engineer appointed by the municipality for the purpose be asked to appoint a day on which he will attend at the time and place named in the requisition, etc., etc.

Provided nevertheless that when it shall be necessary to obtain an outlet that the drain or ditch shall pass through or partly through the lands of more than five owners (the owner first mentioned in the section being one) the requisition shall not be filed unless,

(*a*) Such owner shall first obtain the assent in writing thereto of (including himself) a majority of the owners affected or interested.

Upon the 25th of August, 1891, one George Comrie, claiming to be the owner of the south-west quarter of lot No. 27, of the 7th concession of the township of Osgoode, and as such entitled to avail himself of the above section, filed a requisition with the clerk of the municipality whereby, representing himself to be owner of the said south-west quarter of said lot No. 27, he required a ditch to be made

through such lot, and therein alleging that it would be necessary to continue the ditch through certain other lots mentioned therein, among others, the north-west quarter of the same lot No. 27 of which his father William Comrie was named as owner, and the west half of lot No. 28, in the 7th concession, and the north half of lot No. 27, in the 6th concession, whereof the appellant James York was named as owner, and alleging further that as the said owners had failed to agree upon the respective portions of the proposed work, they required that the engineer appointed by the municipality for the purpose should name a day when he would attend at the locality of the said proposed drain and examine the premises, hear the parties and make his award under the provisions of the statute. This requisition was signed by George Comrie and his father and four others of the persons named as owners of the respective lots named, such owners including the municipality as owners of the roads to be crossed or benefited by the proposed ditch, being in all ten in number.

The award made by the engineer upon its face professed to have been made in pursuance of the above requisition, so that several matters referred to in the argument as having taken place prior to the presentation of the said requisition can have no bearing upon the present question, which must be determined upon the sufficiency of the above requisition to set the Act in motion, the contention of the appellants being that as it was not signed by a majority of the owners of the lands affected by or interested in the proposed drain, the award affects the south half of lot 28 in the 6th concession, not named in the requisition at all, or professes so to do, of which the appellant Isaac York claims to have been and to be the owner. The appellant James York the younger claims to have then been and to be the owner of the north half of lot No. 27, in the 6th concession, set down in the requisition as having then been owned by the appellant James York, and who, although being as stated in the requisition the owner of the west half of lot No. 27, in the 7th concession, did not sign the requisition. Now it is admitted that

if James York the younger and Isaac York were respectively at the time of the presentation of the said requisition owners of the said respective lots claimed by them, and if George Comrie, who was the person who as owner of the lot of which he was named to be owner, was asserting the right to set the Act in motion, was not such owner, then the requisition was not signed by a majority of the owners of lands affected or interested as required by the Act, and in such case the award which is impeached must be set aside as unauthorized by the Act. Indeed it seems to me that if George Comrie, who was the person who as the one requiring the drain to be made was the originator of the requisition, was himself not an owner, that alone would be sufficient to invalidate proceedings originated by him, and taken upon his requisition, but it is not necessary to proceed upon this ground alone, concurring as we do entirely in the judgment delivered by Mr. Justice Osler, that James York the younger and Isaac York were respectively owners of the lots whereof they claim to have been owners and must be counted as such in estimating the sufficiency of the said requisition, and that George Comrie was not such owner of the lot whereof he claimed to be the owner. It is difficult to see how the municipality are to assent in writing to the requisition to be presented to their clerk before it can be presented, but however that may be we entirely agree with the judgment of the Court of Appeal that they cannot be as such assenting parties to the requisition presented by George Comrie upon which the award which is impeached was made. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Belcourt, MacCracken & Henderson, solicitors for appellants.

O'Gara, MacTavish & Gemmell, solicitors for respondents.

## IN THE HIGH COURT OF JUSTICE.

[COMMON PLEAS DIVISION.]

DAGENAIS VS. THE CORPORATION OF THE TOWN OF  
TRENTON.

(Reported 24 O. R. 343.)

*Municipal Corporations — Ditches and Watercourses Act, R. S. O. ch. 220, sec. 5, as amended by 52 Vict. ch. 49, sec. 2 (O.)—Default of Engineer—Mandamus.*

An owner of land, desiring to construct a drain on his own land and to continue it through that of an adjoining owner, served him with the notice provided by the Ditches and Watercourses Act, R. S. O. ch. 220, sec. 5, as amended by 52 Vict. ch. 49, sec. 2 (O.), to settle the proportions to be constructed by each, and, on their failing to agree, served the clerk of the municipality with the notice provided for by such Act requiring the engineer to appoint a day to attend and make his award. The clerk immediately forwarded the notice to the engineer, who was absent, and who declined to attend:—

Held, that a mandamus would not lie against the municipal corporation to compel their engineer to act in the premises.

This was an action tried before Armour, C.J., without a jury, at Belleville, at the Autumn Assizes of 1893.

The action was for a mandamus to compel the defendants in pursuance of a notice under the Ditches and Watercourses Act, R. S. O. ch. 220, to send their engineer to act and adjudicate between the plaintiff and one Graham, with reference to the construction of a ditch or drain through the plaintiff's and Graham's land.

The plaintiff and Graham were the owners of adjoining lands. The natural incline of the land was towards and over Graham's land to a living stream or creek thereon.

The plaintiff desired to construct a drain on his own land and continue it on Graham's lands to the stream or creek; and, on the 13th December, 1892, served the notice, given by the Ditches and Watercourses Act, on Graham, notifying him that it was necessary as an outlet for the drainage of his, plaintiff's land, to continue a drain he was constructing on his own

lands, through Graham's to the said stream or creek, and requesting Graham to attend, etc., at a time named, for the purpose of agreeing, if possible, upon the respective portion of such ditch or drain to be made, etc., by the several parties interested. The plaintiff and Graham met, but were unable to agree as to same.

The plaintiff then served on the clerk of the municipality the notice provided by section 5 of the Ditches and Watercourses Act, as amended by section 2 of 52 Vict. ch. 49 (O.), which, after stating the necessity for the drain, the notice served on Graham, the failure of the plaintiff and Graham to agree, etc., requested that the engineer appointed by the municipality be asked to appoint a day on which he would attend at the locality of the proposed ditch or drain and examine the premises, hear the particulars, and make his award under the provisions of the Ditches and Watercourses Act.

The clerk immediately notified the engineer and enclosed a copy of the notice. The engineer, who was at Sudbury, some hundred miles away, wrote the clerk that he could not attend to the matter.

Nothing having been done, the plaintiff notified the council of the above facts, and prayed to have the defendants perform their duty under the Act, in accordance with the notice, by ordering the engineer to perform his duties under the Act; and that in default of the compliance with said duty on their part, the plaintiff would be compelled to proceed by mandamus. The plaintiff again notified the defendants in the matter, but nothing having been done, this action was brought.

The learned Chief Justice reserved his decision, and subsequently delivered the following judgment:

November 1, 1893. Armour, C.J.:—

I am of opinion that this action as framed is not maintainable.

At the time the requisition was served upon the defendant corporation, the defendant corporation had an engineer.

and the clerk of the defendant corporation notified such engineer, enclosing a copy of such requisition as by law he was required to do.

The engineer, whose duties had for a long time compelled, and were then still compelling, his absence many hundred miles from Trenton, wrote to the clerk that by reason of such duties he was unable to attend to the requisition.

Under this state of circumstances this action was brought in effect to compel the defendants to compel their said engineer to act upon the said requisition.

I do not think that such an action will, under such circumstances, lie against the corporation.

The proper course would have been to apply to the council of the defendant corporation to appoint another engineer, and failing their doing so, to bring an action to compel them to do so.

The council ought upon receiving the answer of the engineer to the letter of their clerk enclosing a copy of the requisition, to have at once appointed an engineer or other person to act upon the requisition, but this they neglected to do until after this action was brought, and the engineer or other person then appointed did not proceed thereon as the law directs.

The action must be dismissed, but owing to the neglect of the council to perform their duty as above mentioned, it will be without costs.

The plaintiff moved on notice to set aside the judgment entered for the defendants, and to have the judgment entered in his favour.

In Michaelmas Sittings, December 6, 1893, before a Divisional Court composed of Galt, C.J., Rose, and MacMahon, JJ., Clute, Q.C., and O'Rourke, supported the motion. The corporation are responsible for the default of the engineer to do his duty. It is no answer that the engineer could not act. It was the duty of the corporation to see either that he did act, or put some one in his place who would act. Unless mandamus will lie against the corporation the statute would

be of no avail: *White vs. Corporation of Gosfield* (1), *Murray vs. Dawson* (2).

*Marsh, Q.C., contra.* The remedy for the default of an officer called upon to do any duty under the statute is against the particular officer, and not against the corporation. The notice is to be served, not on the corporation but on the clerk, and the clerk is to notify, not the corporation, but the engineer, and therefore the default is not that of the corporation, but of the particular officer who is required to do the particular duty. An injunction will not lie against a corporation to compel them to take action against one of their officers for a breach of his duty, neither will a mandamus: *Attorney-General vs. Clerkenwell Vestry* (3), *Attorney-General vs. Guardians, etc., of Dorking* (4), *Regina vs. Commissioners, etc., of Southampton* (5), *Regina vs. Mayor, etc., of Derby* (6). A mandamus also will not lie where there is another remedy; and an action lies against the engineer for the breach of his duty: *Re Whitaker and Mason* (7), *Re Marter and Court of Revision, etc., of Gravenhurst* (8).

December 30, 1893. *Rose, J.*:—

The amending statute is 52 Vict. ch. 49 (O.). By it—section 2—the duty of the clerk and engineer is defined; the municipal corporation is not mentioned in the section.

If there has been any default under such section it has been the default of the engineer in not naming a time at which he would attend as he was required by such section to do.

It is not necessary to determine whether, if an application had been made against the engineer for a mandamus, it would, on the facts stated, have been successful; nor is it necessary to determine whether, if a demand had been served on the corporation to remove the engineer and appoint a new engineer, and there had been a refusal, an application

(1) 2 O. R. 287, 10 A. R. 535.

(2) 17 C. P. 588.

(3) [1891] 3 Ch. 527.

(4) 20 Ch. D. 593-605.

(5) 1 B. & S. 5.

(6) 2 Salk. 436.

(7) 18 O. R. 63.

(8) 18 O. R. 243.

for mandamus against the corporation would have been granted, for neither of such cases is before us on the pleadings or evidence.

The demand served on the corporation, was that "the engineer appointed by the municipality, be asked to appoint a day," etc. There is no such duty cast upon the council or corporation in terms by the statute. As I have pointed out, the officers, viz., the clerk and engineer, are required to do certain acts, but not at the request of the corporation or council. If it is said that the council might have removed the engineer, the answer is at hand—it was never requested so to do.

If, again, it is urged that the corporation might have applied for a writ of mandamus, a complete answer would be that it was not in terms asked to do so; or, if the demand could be construed as a request to make such an application, and there had been neglect or refusal on the part of the corporation, then *Regina vs. Mayor, etc., of Derby* (9), shows that for such default the corporation is not subject to such an order as is here asked for, for the Court will not require one party to take proceedings by way of mandamus, or by way of motion for mandatory injunction, to compel another to do his duty.

I am, therefore, of opinion that the judgment was right, and that the motion must be dismissed with costs.

MacMahon, J.:—

The plaintiff asks by his action for a mandamus to compel the defendants to send their engineer to act and adjudicate between the plaintiff and one Graham in the terms of a notice served on the defendant corporation under the Ditches and Watercourses Act, R. S. O. ch. 220, sec. 5, as amended by 52 Vict. ch. 49, sec. 2 (O.).

After the receipt of the notice, the clerk of the corporation duly forwarded the same to the engineer as required by



section 8 of the Act. The engineer appointed by the town of Trenton (Mr. Evans), had for some time prior to the notice being given, been engaged at Sudbury, many hundreds of miles from Trenton, and when the notice reached him, he returned it to the clerk of the corporation, stating he could not attend to the matter.

It is only under very exceptional circumstances that mandamus will lie to compel a party to take certain proceedings for the benefit of another, as in *Regina vs. Commissioners, etc., of Southampton* (10), where a duty having been imposed by statute upon the defendants, the commissioners of the Port of Southampton, to collect certain duties, called petty customs, from exporters and importers, and pay a certain proportion of such duties to the town of Southampton, a writ of mandamus issued directing the commissioners to levy the duties from the exporters and importers at the port, and to pay over to the town its due proportion of such duties.

The general rule is, that a mandamus to one person to command another person to do an act, will not lie: *Regina vs. Mayor, etc., of Derby* (11), where the Court said: "It is absurd that a writ should be directed to one person to command another."

The engineer being an officer of the corporation, upon his refusal to act, the plaintiff might have applied for a mandamus to compel him to perform his duty in the premises.

The law is clearly stated in *Mechem on Public Officers*, section 946. "But though the officer vested with discretion will not be compelled to reach any particular conclusion, he cannot refuse, in violation of his duty, to act at all, and if he does, mandamus may be resorted to to compel him to act—to take whatever action is necessary as a preliminary to the exercise of his discretion, . . . as the particular case may require."

The plaintiff has mistaken his remedy. He should have applied for a mandamus against Mr. Evans, the engineer of the town; or, as stated in the judgment of the learned Chief

Justice, should have applied to the corporation to appoint a new engineer, and, upon the neglect or refusal of the town to make such appointment, to apply for a mandamus to compel the corporation to do so.

The appeal must be dismissed; the costs of the motion will follow the result.

Galt, C.J., concurred.

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IN THE HIGH COURT OF JUSTICE.

[QUEEN'S BENCH DIVISION.]

RE MCFARLANE VS. MILLER ET AL.

(Reported 26 O. R. 516.)

*Statutes—Drainage and Watercourses Act, 1894—57 Vict. ch. 55, sec. 22, sub-sec. 6 (O.)—R. S. O. ch. 220, sec. 11, sub-sec. 5—Directory.*

The provisions of sub-sec. 6 of sec. 22 of 57 Vict. ch. 55 (O.), the Ditches and Watercourses Act, 1894, which require the Judge of the County Court to hear and determine an appeal from an award thereunder within two months after receiving notice thereof, are merely directory.

This was an appeal from a judgment of Robertson, J., dismissing an application for a writ of prohibition to restrain one Mary McFarlane and the County Court Judge of the county of Oxford from proceeding with an appeal against an award in a matter under the Ditches and Watercourses Act, 1894, 57 Vict. ch. 55 (O.).

An award had been made, dated July 31st, 1894, under section 16 of the Act, by one F. J. Ure, an engineer appointed under section 4, and filed with the clerk of the municipality on August 1st, 1894, under section 18. Notice of appeal, dated August 11th, was given by Mary McFarlane, and the clerk received it on August 13th, and immediately transmitted it, with the necessary papers, to the Judge, who received them about August 15th. Nothing further was done

until October 12th, when the Judge appointed November 7th for the hearing of the appeal, on the return of which appointment the engineer appeared, and contended that the award had become absolute, as the appeal had not been heard and determined by the Judge within two months from the receipt of the notice from the clerk, under section 22, sub-section 6.

The appointment was then adjourned until November 23rd, when the same objection was renewed by counsel for certain other parties, non-appellants, but was overruled by the Judge, who proceeded with the appeal, and some time in January, 1895, gave judgment and referred the award back to have certain alterations made.

An application was then made for a writ of prohibition, which was argued on March 29th, 1895, before Robertson, J., who dismissed it with costs.

From this judgment an appeal was had to the Divisional Court, and was argued on May 22nd, 1895, before Rose and Falconbridge, JJ.

F. R. Ball, Q.C., for the appeal. The Judge must hear and determine the appeal within the two months. The word "shall" used in sub-section 6 of section 22, 57 Vict. ch. 55 (O.), is imperative, without any limitation. Under the first Ontario Interpretation Act, 31 Vict. ch. 1, sec. 6, there was the qualification, "Unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning, or calling for a different construction": section 6. That section was held by Chief Justice Moss to be exceedingly elastic: *Re Lincoln Election* (1). The Legislature recognizing this, have changed it since, both in R. S. O. (1877) sec. 8, and R. S. O. (1887), sec. 8. and omitted the limitation, leaving the word "shall" distinctly imperative. Besides, R. S. O. ch. 220, sec. 11, sub-sec 5, although it limits the time within which the appeal is to be heard and determined, provides that it may be heard after the time, and as that is omitted in the present statute, 57

Vict. ch. 55, sec. 22, sub-sec. 6, where the time is extended from one month to two months, it must be assumed the Legislature considered two months long enough under any circumstances. This is not a judicial proceeding, and the Judge does not sit as a Judge, and he must comply with the Act: *Re Pacquette* (2), *Gibbons vs. Chadwick* (3). The Court will grant prohibition after a judgment has been obtained if there is a want of jurisdiction: *Robertson vs. Cornwall* (4), *In re Brazill vs. Johns* (5).

A. Bicknell, contra. The dissatisfied party here has done all she could by appealing within fifteen days, under section 22, sub-section 1; and serving the clerk with notice; sub-section 2. She had no control over the Judge, whose duty is prescribed by sub-section 6, and his default (if any) should not affect her rights. There was no duty on the party, it was on the Judge: *Maxwell on the Interpretation of Statutes*, 1st ed., 337. The word "shall" here is not imperative, merely directory: *In re Ronald and the Village of Brussels* (6), *Town of Trenton vs. Dyer* (7), *Re Lincoln Election* (8), *The Queen vs. The Mayor, etc., of Rochester* (9), *Dwarris on Statutes* (Potter) 221, 222, 224; *Endlich on the Interpretation of Statutes*, par. 436; *Hardcastle's Construction of Statutes*, 2nd ed., 121.

Ball, Q.C., in reply. Our present Interpretation Act must govern. English cases are not in point, because in them the word "shall" is varied according to circumstances as in our original Act, 31 Vict. ch. 1, sec. 6.

May 27th, 1895. Rose, J.:—

Having regard to the principles of construction which may be found in *Endlich on the Interpretation of Statutes*, par. 436, especially referring to *Regina vs. Ingram* (10), *Hardcastle's Construction of Statutes*, 2nd ed., pp. 262-3; *In re Ronald and the Village of Brussels* (11), I think we must

(2) 11 P. R. 463.

(3) 12 C. L. T. Occ. N. 207.

(4) 7 P. R. 297.

(5) 24 O. R. 209.

(6) 9 P. R. 232.

(7) 21 A. R. at p. 381.

(8) 2 A. R. 324.

(9) 27 L. J. Q. B. 45.

(10) 2 Salk. 593.

(11) 9 P. R. 232.

hold the provisions of sub-section 6, section 22, ch. 55 of 57 Vict. (O.), directory, so as to prevent the injustice of a construction which would cause an appellant who had done all the law required him to do to lose his right of appeal—in fact, practically, to have his appeal dismissed, because the Judge might neglect to hear and determine, or hear, or determine, the appeal within two months after receiving notice thereof: see the observations of Cameron, J., in *Re Ronald and the Village of Brussels* (12), which *mutatis mutandis* apply to this case.

The only substantial doubt which was raised on the argument was by reason of the change in the language of the section from that of section 11, sub-section 5, of ch. 220, R. S. O.; but it seems to me that the words “but his neglect or omission so to do shall not render invalid the hearing or determining of the appeal after the lapse of that time,” were probably dropped because the law being so it was unnecessary to declare it, and the remaining words of the section enabling the Judge to fix a later date for the hearing and determining than that fixed by the section were dropped so as to make the duty imperative upon the Judge, that is to say, so that it should not appear to be optional on the part of the Judge whether he would perform the duty within the time required or not, although the non-performance on his part would not necessarily invalidate the appeal.

Whether such were the reasons for varying the language of the section or not, I cannot find in the change any sufficient declaration of an intention to change the law from what I understand it was apart from the declaration in sub-section 5, of section 11.

I am, therefore, of the opinion that His Honour Judge Finkle was right in holding that he had jurisdiction to hear the appeal, and that the judgment of my brother Robertson, dismissing the motion for prohibition, must be affirmed with costs.

Falconbridge, J., concurred.

## IN THE COURT OF APPEAL, ONTARIO.

DALTON VS. TOWNSHIP OF ASHFIELD.

(Reported 26 O. A. R. 363.)

*Ditches and Watercourses Act—Failure to Comply with Award—Action—Purchaser from Party to Award.*

No action lies to recover damages because of failure to comply with an award made under the Ditches and Watercourses Act; the remedy, if any, being under the Act itself.

The purchaser of land from an owner who was a party to proceedings under the Act in respect of that land is entitled to enforce the award.

Judgment of a Divisional Court reversed.

Appeal by the defendants from the judgment of a Divisional Court.

The action was brought by a landowner to recover damages for the flooding of his lands and the consequent injury to his crops by water alleged to have been improperly cast upon it by the defendants, and for an injunction. The defendants pleaded, first, a prescriptive right; second, that the plaintiff's predecessor in title, and one Garvey, living across the road from him, and the defendants, were parties to a reference under the provisions of the Ditches and Watercourses Act, 1883, under which the defendants were required to keep in repair a certain box drain crossing the highway; that the plaintiff's rights, if any, were under the provisions of the said Act, and upon the terms of the award, and not by action; and third, that the plaintiff's damages, if any, were caused by his own neglect to keep open a certain drain upon his own land, which, by the terms of the award, he was bound to maintain. There was also a general denial of the plaintiff's claims.

The action was tried at Goderich on the 31st of May, 1898, before Ferguson, J., who, on the 7th of June, 1898, gave the following judgment:—

Ferguson, J.:—

The plaintiff is the owner of the east half of lot number five in the Lake road, concession west, in the township of Ashfield, containing sixty-six acres, more or less, and has been such owner some four years. His predecessor in title was a person named O'Keefe, if my recollection of the name is right.

This land of the plaintiff lies lower than the land to the east of it, belonging to one Thomas Garvey, and would, in the natural order and state of things, be liable to the flow over or upon it of the surface water from Garvey's land, and, as shown by much of the evidence, there was upon the plaintiff's land a sort of depression resembling a not very well defined watercourse, in which the surface water collected and flowed to what was called an "outlet," and thence to the lake. I may, however, say that the lands in the neighbourhood seemed to me on the evidence to be so flat and low that one would scarcely expect to find a natural watercourse with well defined banks.

The Lake Shore road, now called the "Gravel road," runs in a direction nearly north and south between the lands of the plaintiff and those of Garvey.

The fourth concession road of the township meets this Lake Shore road on the east side at a distance of twenty-three and a half rods or thereabouts from the place of the flow of water across the Lake Shore road now complained of. This meeting is not at right angles, but this is not material.

Over thirty—some say nearly forty years ago—this Lake Shore road was graded, a ditch being formed on the east side of the turnpike of, as nearly as I could understand the evidence, about the width and depth that one ordinarily finds such ditches. Cross sections of the ditch were put in, but it was not contended that there was anything extraordinary in its dimensions. There was also a ditch on the west side of

the turnpike, but little, if anything, was said about this at the trial. There were ditches from the east on the fourth concession road on each side of the turnpike emptying into this ditch on the east side of the turnpike of the Lake Shore road, the water in which ran to the place of the present difficulty and then crossed the road through a large log culvert towards the plaintiff's lands, then owned by his predecessor in title. This state of things continued for a considerable period, when a change was made, continuing the ditch on the east side of the turnpike of the Gravel road north to a creek, and, in a way, filling up the large culvert, but not so doing completely, but leaving the timbers of it lying across underneath the road so that, as is said in the evidence, as much water passed through as could be carried by the present cedar box, which will be spoken of hereafter. This continued for a period. Garvey was not satisfied, and, as stated by a witness (the engineer), claimed, and still claims, the right to have the large culvert open.

In the year 1889, the defendants, upon the requisition of Garvey, appointed an engineer, Mr. Warren, under the provisions of the Ditches and Watercourses Act, 1883, who, on the 8th day of November, 1889, made his award. This award stated how the necessary drains should be made and by whom. It was not said or contended that any of the requirements necessary to the full validity of this award had not been duly fulfilled. By the award the defendants, the township, were to put in a close box culvert, or pipe, 10 x 12 inches inside measure, of cedar at the place where the culvert had been; such box or culvert to extend across the road allowance and to be two feet six inches deep below the surface of the ground at the easterly limit of the road allowance at the place of the culvert, and this culvert was to be maintained by the defendants.

The then owner of the plaintiff's lands was by the award to commence at the westerly end of the box or culvert and to dig or deepen his then ditch forty and a half rods, commencing at the depth of fifteen inches and carrying this level out to where the ditch entered the natural outlet so as to give the



water an even fall or run, and was to maintain the ditch. The award provided that this portion of the ditch might at any time be covered, but that there should be a sufficient outlet for any water that might pass through the culvert from the lands of Garvey.

These works were professedly done pursuant to the award, and the then owner of the plaintiff's land was the inspector of the work while it was being done.

The cedar box culvert was put in at the expense of the defendants under such inspection. Garvey put in two board drains, having together a sectional area of about twenty-three and a half square inches, and carried these into the cedar culvert, but was at liberty for the purpose of draining his land to put down as many more as he thought proper.

The then owner of the plaintiff's land put down one board box drain of a sectional area of about twenty-nine and three-quarter inches. Many things were said about this drain on the plaintiff's land not having been properly located, etc. But apart from all this, the evidence is that if the then owner of the plaintiff's land had either left his ditch open as he might have done, or in putting in a covered drain, which, under the award, was optional with him, had put in one equal in size to the cedar box culvert across the road allowance put down by the defendants, the present or any difficulty could not have arisen.

The plaintiff complains that, by reason of the negligence of the defendants, water is brought upon his lands, depriving him of the proper and full use of the lands for the purposes of cultivation. He concentrates his complaint in the ninth paragraph of the statement of claim, thus:—

“9. The plaintiff charges the defendants with negligence in the construction and in the maintenance of the said culvert and of the said highway, and in bringing upon the plaintiff's land water from the said highway and from the adjoining lands, and that the said culvert is improperly constructed and is not necessary for the proper construction and maintenance of the said highway.”

The full meaning of this may be a little difficult to gather, but I take it, at all events, to embrace a charge of negligence in the construction and maintenance of the cedar culvert, and I now think that such is really the gravamen of the plaintiff's complaint.

There is evidence showing or going to show that owing to part of the cedar culvert on the east side of the turnpike having become uncovered or bare, some water from the ditch entered it, and that water entered the culvert through an open hole in Garvey's box leading from the culvert to his land, this last being upon Garvey's lands and not in the road allowance.

The plaintiff's father (who, it was insinuated, is the real owner) in giving evidence on behalf of the plaintiff, said that if the cedar culvert had been in good repair all the water of which the plaintiff complains would have passed on down to the creek in the ditch on the east side of the turnpike. And, assuming this to be so, it is plain that it could not have injured the plaintiff.

It appeared from the evidence that at no time after the works were done under the award did any water pass from one side of the turnpike to the other that did not pass through this cedar culvert, except sometimes on the occasion of freshets, when some passed over the turnpike at points not far from this place. This was not made a matter of importance at the trial.

The plan of taking care of the waters adopted by the award was, so far as appears, satisfactory, and the parties acted upon it, no doubt, in good faith.

The plaintiff's predecessor in title was a chief actor in the construction of the works, he being the inspector, as before stated.

The plaintiff sought to disclose a cause of action by showing that an increased quantity of water was brought down the ditch on the east side of the turnpike after the making of the award and completion of the works under it, but in this I think he failed.

In my opinion, the evidence does not show that there was any appreciable increase.

The action is, I think, an action against the defendants substantially for alleged non-repair or improper maintenance of the cedar culvert, the plaintiff claiming damages, which he says resulted to him.

The defendants set up and relied upon the award and the Act, the Ditches and Watercourses Act.

In my view of the case it seems to fall plainly under the provisions of secs. 34 and 35 of 57 Vict. ch. 55 (O.), now sections having the same numbers in R. S. O. ch. 285, and I think the remedy there given and pointed out is an exclusive one. The remedy would, as I think, be exclusive and the only one even if the words of the sections were not as plain as they are.

It was contended on the part of the plaintiff, that, as the claim is for damages and not a claim to have the maintenance of the culvert enforced, the case does not fall under these sections, and that there is a remedy by action.

The scope of the Act seems to me to be against this contention, and I think the cases of *Murray vs. Dawson* (1), and *Hepburn vs. Township of Orford* (2), are authorities against it. In each of these cases damages were claimed. Non-completion of the construction of a ditch and neglect or default in the maintenance of it after completion seem to be in this regard placed on the same footing by sub-section 2 of section 35 above referred to.

I am of the opinion that the plaintiff's remedy, if any he has or is entitled to, is the remedy given by the Act, and that only.

I only desire to add that the amount of damages claimed and sought to be established by evidence seems to be an extravagant estimate, even if it should be assumed that he could recover.

The action should, I think, be dismissed with costs.

(1) (1867) 17 C. P. 588.

(2) (1890) 19 O. R. 585.

The plaintiff moved against this judgment on the 24th of January, 1899, before a Divisional Court [Armour, C.J., Falconbridge, and Street, JJ.], and on the 13th of January, 1899, the judgment of that Court was given as follows:—

Armour, C.J.:—

The damage of which the plaintiff complained arose from two concurrent causes, each the result of the negligence of the defendants, one cause being their neglect to keep the culvert in repair, and the other their neglect to keep the drain on the east side of the gravel road in repair; if they had kept the culvert in repair, the water from the drain could not have gone into it, and if they had kept the drain in repair the water from it could not have escaped into the culvert. The plaintiff's remedy for the former cause was under the Ditches and Watercourses Act, and for the latter was by action at law, and this remedy he has rightly adopted by this action.

Prior to 1881 there was a culvert intended to carry the water from this drain across the Gravel road and on to the plaintiff's land, which was said to have been the natural course of the water, and prior to that date water had been brought down to this drain and culvert from the fourth concession line which would not naturally have flowed there, and was thence discharged on the plaintiff's land. In 1881 this last mentioned culvert had become decayed and had fallen in, and, owing to the large quantity of water which by that time had been brought into this drain and culvert, and the injury occasioned by it to the adjoining lands, the defendants determined to and did continue the drain northward to Finn's Creek, intending thereby to carry the water which had previously passed through the culvert to Finn's Creek. After this drain was continued to Finn's Creek and up to 1899, it is said that some water still found its way through the ruined culvert. In 1889 an award was made by an engineer under the Ditches and Watercourses Act requiring the defendants "to put in a close box culvert or pipe, 10 x 12 inches inside measure, of cedar, at where there was a

culvert, at the distance of twenty-three and a half rods measured northerly along the Gravel road from the southerly limit of said lot four, said culvert to extend across the road allowance and to be two feet six inches deep below the surface of the ground at the easterly limit of the road allowance, where the culvert is to be put in; the corporation to maintain said culvert; this box or culvert is put in without prejudice to any action that may be taken to have the culvert formerly at this place re-opened."

This last mentioned culvert was put in solely for the purpose of taking the water from the land of one Garvey, which lay on the east of the Gravel road and opposite to the land of the plaintiff, and it was not by it intended to in any way affect the drain on the east side of the Gravel road, or to take any of the water from it. I doubt if ever this culvert was a close box as required by the award, or if it was put down to the depth prescribed by the award. It seems that by the time this last mentioned culvert was put in the water ceased to find its way through the ruined culvert, and, at all events, upon putting in of the last mentioned culvert, it ceased to find its way through the ruined culvert, and that culvert was stopped up, and the water, instead of finding its way through that culvert, flowed northward along the drain to Finn's Creek, as it was intended it should by the defendants when they continued the drain to Finn's Creek in 1881. The defendants having constructed this drain and having brought more water into it than would have naturally flowed into it, were bound to keep it in repair, and to see that no injury was done by the water brought into it and which flowed along it.

The plaintiff is, in my opinion, therefore, entitled to recover in this action, and it does not detract from his right to recover that part of his damage was occasioned partly by one cause and partly by another: *Ellis vs. Clemens* (3):

But the difficulty is to distinguish between the damage arising from one cause and that arising from the other. He was bound to make drains on his own land for the water that

properly came through the culvert, but not for the water that came from the drain.

I think that we shall be doing what is just in awarding him \$30, and enjoining the defendants from allowing water to escape from the drain on to his land.

Falconbridge, J. :—

I agree in the result.

Street, J. :—

At the time of making Mr. Warren's award in November, 1889, the water which collected upon the highway to the south and south-east of the point where the box drain was made under the award ran along a ditch upon the easterly side of the Gravel road, in a northerly direction, past the plaintiff's land, and discharged itself into Finn's Creek, by which it was then carried into Lake Huron; and none of this water, as I understand the evidence, found its way upon the plaintiff's land, excepting, perhaps, in times of excessive flooding, when it might overflow the ditch. This, however, could only happen when the whole country was flooded, and no harm would result.

In 1889, Garvey, who owned the land across the Gravel road from the plaintiff's land, desired to drain his land by carrying a drain across the Gravel road and through the land owned by the plaintiff, which was then owned by one O'Keefe. Thereupon, after notice to the defendants and to O'Keefe, an award was made by the engineer, Warren, directing the putting in of a box drain under and completely across the highway, and a drain connecting with it on O'Keefe's side of the road. The defendants were required to keep the box drain in repair, and O'Keefe was required to keep the connecting drain on his side in repair. This award, however, was made for the specific and limited purpose of carrying off the water from Garvey's place only, and did not profess to deal with or provide for, and did not require the defendants to receive or carry away, any water that did not come from Garvey's place. The level of the highway and even of the

bottom of the ditch, I have referred to running along its easterly side, were so much above the level of the land of Garvey and O'Keefe on each side of it, that it was necessary that the box drain from one to the other should pass several inches below the bottom of the ditch. There is no complaint from anyone that the box drain is not in perfect working order so far as the functions which it was intended to perform under the award are concerned, that is to say, it is open and carries off without difficulty all the water which accumulates upon Garvey's place. The trouble complained of arises from another cause, which has nothing to do with the award. It appears that the top of the box drain is made of two boards, which do not meet in the middle by two or three inches, and the result is that some of the water which should run along the ditch northerly to Finn's Creek escapes into the box drain and runs from it into the plaintiff's fields. The learned Judge has come to the conclusion upon these facts that the real complaint of the plaintiff against the defendants is that they have not kept the box drain in repair, and that his remedy against them is not by action, but by proceedings under the Ditches and Watercourses Act. With great respect, it seems to me that this is not the proper view of the case. If proceedings had been taken by the plaintiff, as successor in title to O'Keefe, under the Act, and the engineer had been called in, he would have been in duty bound to report that the box drain was in perfect repair, so far as the intention of the award required. It serves in that capacity properly and effectually its duty as the top of the box drain: it is defective only in another capacity, viz., as the bottom of the township ditch, with which the award has nothing to do. Looking at it in this, which I think is the proper, view, the judgment cannot be sustained upon the ground on which it has been placed, for the defendants, having by their ditch brought water from the south and east, are liable in damages if they allow it to escape through the bottom of their ditch, or in any other way, upon the plaintiff's land.

I do not think the defendants have shown any prescriptive right to cast this water upon the plaintiff's land. It appears

that down to the year 1881 the water from the south ran along the ditch at the side of the highway until it reached the point where the box drain now is, or near it, when it crossed the road by a culvert, and running through the plaintiff's land found a natural outlet beyond it. In 1881 the council filled up the culvert with logs, and continued the ditch to the north along the roadside, cutting through a slight raise on the way, and intended to take all the water to Finn's Creek. It is stated, however, that a good deal of it from time to time found its way through the spaces between the logs upon the plaintiff's land. The water reaching the plaintiff, however, by this sort of percolation must have naturally decreased year by year as the spaces became more completely packed in with earth, and would not entitle the defendants to open a new channel by which additional water should be cast in a direct stream through this box drain upon the plaintiff's land, and to defend their action upon the ground of prescription. The new body of water and the concentrated form in which it came were new trespasses not covered by the prescriptive right, supposing it to have been acquired, to cast percolating water upon the plaintiff. I think, however, that it stands to reason that the work done in 1881 with regard to the old culvert must have made very material changes in the flow of water running along the east side of the highway, and that any prescription claimed must be taken to date from then. Down to that time the only outlet for this water was through the culvert and across the plaintiff's land; the change made was the filling up of the culvert with logs and the opening of a new outlet to the north along the highway to Finn's Creek. Unless this work was utterly thrown away, it must be assumed that from that time the quantity of water getting from the highway to the plaintiff's land was very greatly decreased. No one pretends to say that this new outlet was not effectual, although it was said that a good deal of water still found its way between the logs.

The plaintiff, therefore, in my opinion, has made out that the defendants have brought a certain quantity of water from



the highway upon his land which he was not bound to take, and they have in their pleadings set up a prescriptive right to do so, and have failed to make it out. The actual amount of the damage caused to the plaintiff is almost a matter of guess-work, because he has not kept open the drains which he was bound to maintain for the carrying away of the water from Garvey's place coming to him under the award, with the result that it has assisted in flooding his land. I think, under the circumstances, we cannot fix them at more than the nominal sum of \$30, but he has asked for an injunction in addition to damages, and I think he should have one restraining the defendants from allowing the water brought down by the ditch upon the road opposite his farm to flow upon his land, and that the defendants should pay the costs of the action and of the motion before us, and that judgment should be entered accordingly, the present judgment for the defendants being set aside.

The appeal was argued before Burton, C.J.O., Osler, MacLennan, Moss, and Lister, JJ.A., on the 15th and 16th of May 1899.

Garrow, Q.C., for the appellants. The judgment appealed from proceeds on the erroneous conclusion that this is an ordinary culvert, and that the appellants by reason of their failure to keep it in repair are discharging surface water upon the plaintiff's lands. Clearly this is an error. The culvert was made in compliance with the award under the Ditches and Watercourses Act, and if it is not such a culvert as should have been made, or if it is out of repair, the plaintiff's remedy, and only remedy, is that pointed out in the Act: *Hepburn vs. Township of Orford* (4), *Murray vs. Dawson* (5), *Re Stephens and Township of Moore* (6). [The learned counsel also contended in the alternative that, on the evidence, the defence of prescriptive right had been made out.]

Shepley, Q.C., for the respondent. The appellants are using the culvert for purposes altogether outside the matters.

(4) (1890) 19 O. R. 585.

(5) (1867) 17 C. P. 588.

(6) (1894) 25 O. R. 600.

dealt with by the award, and so are liable on the general principle applicable where surface water is brought by one person to another person's land. This is the distinguishing feature in this case. Enforcement of the award to its full extent will not protect the plaintiff, and enforcement of the award is, therefore, not his only remedy.

Garrow, in reply.

June 29th, 1899. The judgment of the Court was delivered by Moss, J.A.:—

Among the matters in dispute between the parties to this appeal there are some which do not admit of serious question.

From the year 1860, when the Lake Shore road was macadamized, until the year 1881, the waters flowing to the north from the line between the 4th and 5th concessions of the township of Ashfield and to the south from what is called Finn's Hill along the ditch on the east side of the Lake Shore road met at and found their way through a large culvert constructed across the road at the point now in question.

From the western mouth of the culvert these waters discharged on the land then belonging to one O'Keefe and now owned by the plaintiff, and found their way over his land through a natural depression or waterway which gradually widened and deepened into what is described as a gully until they reached a creek emptying into Lake Huron.

The surface water of the farm lying to the east of the Lake Shore road, then and now owned by one Garvey, flowed towards the road at the place where the culvert crossed and were carried through it, with the other waters collected in the ditch, over to O'Keefe's land.

The culvert was three or four feet in width, the sides constructed of logs, with a plank top level with a surface of the road. In 1881, during the period of high water, the foundations of the culvert were undermined by the action of the water and the structure caved in.

The township authorities instead of rebuilding it decided to leave the timbers lying as they had fallen and to level up with earth and gravel the depression caused by the cave in.

At the same time they deepened the east ditch from the culvert to the north so as to make a fall through Finn's hill to the creek beyond and thus lead the waters flowing in the ditch from the 4th concession to Finn's creek. It was proposed to completely fill up and do away with the culvert, but Garvey objected, apparently on the ground that to do so would deprive him of the outlet for the waters from his farm; and accordingly it was determined to leave the old timbers in the bottom of the culvert and level the surface of the road.

This, though not entirely satisfactory to Garvey as a means of relieving his land of water instead of the original culvert, continued to be the condition of matters until the year 1889, when, upon the requisition of Garvey, the township engineer was put in motion under the provisions of the Ditches and Watercourses Act and made the award set out in the judgment appealed from.

The object and intention of the proceedings, of the award, and of the work done under it, were to conduct the water from Garvey's land across and under the roadbed and carry it through O'Keefe's land to the natural gully or outlet thereon, so that thereafter Garvey would have no difficulty with regard to it.

That work had no reference to the system of road drainage which had been adopted by the defendants; and, no doubt, with a view to making sure that it would not interfere with the flow of the water in and along the side ditches of the road, it was directed that the box culvert or pipe across the road should be a close box and should be placed two and a half feet below the surface of the ground. Its top was thus a considerable depth below the bottom of the east side ditch.

The box culvert or pipe was directed to be put in by the defendants but was actually constructed and put in by Garvey under the superintendence of O'Keefe, who was appointed inspector of the work. It was of dimensions sufficient to

carry off all the water ordinarily collected on Garvey's farm, but it was contemplated that at times it would be liable to be filled to its utmost capacity.

O'Keefe was directed by the award to dig or deepen the existing ditch on his lot from the western mouth of the box culvert or pipe for a distance of forty and a half rods, giving a fall sufficient to carry the water to the natural outlet, but it was provided that this portion of the ditch might at any time be covered, but that there must be a sufficient outlet for any water that might pass through the culvert from Garvey's land.

O'Keefe acted upon the permission to cover his ditch by placing in the western mouth of the box culvert a short pipe or box 8 inches square and 8 feet in length. The westerly end was placed at a lower level than the end in the box culvert so that it did not fit squarely into the mouth of the box culvert but came from it slopingly, and so made a partial obstruction on the bottom at the junction of the two pipes.

The western extremity of the eight-foot box met and joined end to end with a drain constructed of two planks, each eight inches wide, joined together in the shape of an inverted V (whence it derives the name of V drain), which was continued on towards the gully in O'Keefe's farm.

From the time of the construction of the box culvert and the covered drains or pipes on the O'Keefe farm until the year 1895, when the plaintiff purchased it from O'Keefe, the latter appears to have made no complaint.

The plaintiff during the year 1894 was tenant of the property he now owns, and he says that in that and the subsequent years he observed that when the waters coming in the road ditch along the east side reached the place where the box culvert crossed the road they seemed to disappear through the bottom of the ditch down to the box culvert and to gain access thereto in some way, and so be conveyed across the road to and discharged into his drain. And he says that inasmuch as more water was thus brought to his drains than they were capable of carrying away, the effect

was that the excess quantity came to the surface and overflowed his land.

On the 28th August, 1897, he brought this action, claiming damages for injury to his land and crops in the years 1895, 1896, and 1897, and a perpetual injunction restraining the defendants from maintaining the culvert on the highway and the ditches leading thereto, and from causing the water to flow in and upon the plaintiff's land.

Shortly before the trial an examination was made of the locus in quo, and, upon removing the earth covering the box culvert between the east side of the roadway and Garvey's fence, it was found that at a point in the box three or four feet east of the ditch proper there was an opening, caused by the ends of two planks forming part of the top and side of the box culvert failing to form a close joint with the contiguous planks. At the trial Garvey was a witness and proved that when constructing the culvert he covered this aperture on the top by laying a short piece of plank over it without nailing. The culvert was then covered with earth. This piece of plank seems to have remained in place for some years but was found displaced when the opening was made previous to the trial.

It is conceded that some of the water coming in the east ditch escapes into the opening in the box culvert and is thus carried along with the water from Garvey's land to the mouth of the drain on the plaintiff's land. It is not questioned that such water is alien to the purpose for which the box culvert was constructed and that it should not go into or through it, but should be conducted in the east ditch to Finn's Creek.

The learned trial Judge found, and the evidence fully justifies his finding that if O'Keefe, the plaintiff's predecessor in title, had either left his ditch open, as he might have done under the award, or had put in a covered drain equal in size to the box culvert across the road, the difficulty could not have arisen.

At the trial the chief question raised was whether the escape of the water into the box culvert was, as the defen-

dants contended, owing to neglect to properly maintain the box culvert as directed by the award, and so remediable only by recourse to the provisions of the Ditches and Watercourses Act and not by action, or whether, as the plaintiff contended, it was due to negligence on the defendants' part in bringing the water in the ditch to the point in question and failing to prevent it getting out of the ditch into the box culvert.

The trial Judge held in accordance with the defendants' contention and dismissed the action. The Divisional Court, on the contrary, decided in favour of the plaintiff's contention and awarded him the nominal sum of \$30 damages and an injunction restraining the defendants from permitting any water to escape upon the plaintiff's land from the defendants' drain on the east side of the road through the box culvert.

The judgment of the Divisional Court is in substance a judgment to compel the defendants to repair the box culvert, or, in other words, to maintain it as required by the award. For it is quite apparent that the defendants' easy if not only way of complying with the injunction is to make the culvert a close box culvert. That will at once end the possibility of any water from the east ditch getting to the plaintiff's land.

As shown by the small award of damages the gist of the action was not the damage already suffered, but the prevention of the continuance of the flow of alien water into the box culvert and so upon the plaintiff's land. And the most ready way of preventing it was by maintaining the box culvert in the condition of a close box culvert as directed by the award. Probably the escape from the ditch could be prevented by other means, such as constructing a water tight wooden or stone drain for some distance along the east side of the road where it crosses the box culvert, but that would be unusual and extraordinary in a rural municipality and besides being much more expensive would not be in the least more efficacious.

The construction of the road ditch was not inherently defective. It was and is properly constructed for the pur-

poses for which it was intended, viz., the conduct of the water flowing along the side of the road towards and into Finn's creek. That it fails to wholly perform its functions and that some of the water coming in it gets into the box culvert is due to the fact that the latter is not now a close box culvert.

And that defect is due to failure in maintenance, which means and includes "preservation and keeping in repair;" sec. 3 of the Act, R. S. O. ch. 285, sub-head "maintenance."

The duty of maintenance of the box culvert is cast upon the defendants, and the manner of enforcing the duty is declared by sections 34 and 35.

Any owner, party to an award, whose lands are affected is to notify the defaulting owner to have his portion put in repair within thirty days, and if the repairs are not made and completed within that time, the party giving the notice may notify the engineer to inspect the portion complained of, and it thereupon becomes the duty of the engineer to make an inspection and give directions as to what he may find necessary to be done: section 35. And any neglect to make such inspection after notice is punishable by fine: section 37. Then comes section 38, which enacts that no action, suit, or other proceeding, shall lie or be had or taken for a mandamus or other order to enforce or compel the performance of an award or the completion of a ditch, but the same shall be enforced in manner provided for by the Act.

The plaintiff's predecessor in title was a party to the award, and the plaintiff as his assign stands in his place and is, I think, to be considered an owner, party to the award, under the Act.

The defendants having been directed by the award to maintain the box culvert, the work of preservation and keeping in repair is performance of the award. And performance is to be enforced as provided by the Act, and not by action, suit, or other proceeding.

This is in accord with the spirit and intention of the Act which, as said by Wilson, J., in *Murray vs. Dawson* (7),

"was to place in the hands of either party interested the right to specific performance of the relief sought, but not damages by suit for non-performance of it."

I think, therefore, that the learned trial Judge rightly determined that the plaintiff's remedy was by recourse to the provisions of the Ditches and Watercourses Act.

It is not necessary to discuss whether, if the plaintiff had sustained substantial damages, before he could have called in the engineer and obtained his directions, he could have maintained an action for the recovery of such damages, for the facts do not present such a case.

The plaintiff might in 1895 have called in the engineer and had the box culvert made right before even the trifling damage which he has been found to have sustained during three years had been suffered.

There seem to be other difficulties in the plaintiff's way of obtaining damages.

It is shown that the box culvert was put in under the superintendence of O'Keefe, the plaintiff's predecessor in title, who was appointed inspector for that purpose. It was, therefore, his duty to see that a close box culvert or pipe was put in according to the directions of the award. Through his neglect of that duty an imperfectly closed box culvert was permitted to be put in and has caused the present mischief. Could he or any one claiming under him complain, or maintain an action for damages under the circumstances?

Again, the drains made by O'Keefe upon his own land are not in compliance with the award, and their want of capacity contributes to, if it does not wholly cause the mischief.

Further, up to the year 1881, when the original culvert fell in, all the water coming in the side ditch from the north and south was cast upon the plaintiff's land. And the evidence supports the finding of the learned trial Judge that from that date until the box culvert was put in, in 1889, as much water flowed through the fallen timbers of the original culvert as could be carried by the box culvert.



The putting in of the box culvert was not done for the purpose of relieving the plaintiff's land from any of the ditch water which had formerly flowed upon it, although the work then done undoubtedly had that effect.

There was no duty on the part of the defendants to protect the plaintiff's land from so much of the water coming in the east ditch as formerly went upon his land. There was no undertaking or agreement express or implied that they would do so in the future.

The defendants' right to carry water across the road at that point can scarcely be called an easement, for it was the natural point of concentration. But if it was an easement there is really no evidence of abandonment. According to the plaintiff's own showing some water has been coming through every year from 1894 inclusive, and so the lapse of time from 1889 would not in itself establish an abandonment.

The evidence, coupled with the language of the award, shows that what was done under it was not to prejudice any action that might be taken to restore the original culvert.

There was, therefore, no intention to abandon the right to conduct the water from the east side ditch to and upon the plaintiff's land.

I only indicate, but do not proceed upon, these objections.

Upon the ground that the plaintiff's remedy was under the Ditches and Watercourses Act, I would allow the appeal and restore the judgment of the trial Judge.

Appeal allowed.

COURT OF APPEAL, ONTARIO.

TOWNSHIP OF LOGAN VS. TOWNSHIP OF MCKILLOP.

(Reported 25 O. A. R. 498.)

*Ditches and Watercourses Act—57 Vict. ch. 55 (O.)—Owner—Appeal from Award—Trustees—Service of Notices—Deepening Ditch—Water and Watercourses.*

Per Osler and Moss, JJ.A., Burton, C.J.O., contra.—Where in proceedings under the Ditches and Watercourses Act, 57 Vict. ch. 55 (O.), a declaration of ownership has been made and filed by the person initiating the proceedings, any objection to his status as owner should be made before confirmation of the award; the effect of section 24 being that the award when made and confirmed by lapse of time or on appeal cannot be impeached on such a ground. *York vs. Township of Osgoode* (1892), 24 O. R. 12; (1894), 21 A. R. 168; (1895), 24 S. C. R. 282, distinguished.

Per Burton, C.J.O., and Moss, J.A., MacLennan, J.A. Contra.—A person in possession of land under a lease with an option to purchase, no default having occurred, is not the owner of the land within the meaning of the Ditches and Watercourses Act, 57 Vict. ch. 55 (O.), and is not entitled to initiate proceedings thereunder.

Per Osler, MacLennan, and Moss, JJ.A.—Where land affected by a proposed work is vested in several persons as devisees in trust, none of them living upon the land, or in the municipality in which the land is situate, service of notice of proceedings under the Ditches and Watercourses Act upon one of them for all is sufficient; at any rate sections 23 and 24 cure any objection as to sufficiency of service.

Per Osler, MacLennan, and Moss, JJ.A.—Section 36 of the Act applies where a ditch has been completed and a new arrangement is necessary in regard to its maintenance; it does not apply where a ditch is being deepened or extended and for work of that kind the two years' limitation is not in force.

In the result the judgment of Armour, C.J., at the trial was reversed, Burton, C.J.O., dissenting.

This was an appeal by the plaintiffs from the judgment of Armour, C.J.

The following statement of the facts is taken from the judgment of Moss, J.A.

The plaintiffs in this action seek to recover from the defendants, under the provisions of the Ditches and Watercourses Act, 1894, a sum of \$360.38 for work done by the plaintiff Patrick Gaffney upon a ditch, and a further sum of \$18, the fees and charges of the plaintiff John Roger for

services as an engineer in and about the letting of the said work to the plaintiff Gaffney.

The demand is based upon a certificate in writing, dated the 4th of December, 1895, made by the plaintiff Roger pursuant to the provisions of sections 28 and 29 of the Act in the form prescribed by section 29.

The certificate is in turn based upon an award made by the plaintiff Roger, dated the 29th of July, 1895, in the form prescribed by section 16, sub-section 2, of the Act.

The proceedings which led to the making of the award and certificate may be summarized as follows:

On the 11th of June, 1895, one Timothy Kelly, who is alleged to be the owner of the north half of lot 35 in the 5th concession of Logan, filed with the clerk of the township of Logan a declaration of ownership of said premises in the form prescribed by section 7 of the Act, declaring himself the owner within the Act in fee simple, and on the same day received from the clerk a notice or notices, according to Form (C) prescribed by section 8 of the Act, for service upon the owners under the Act of lands affected by a proposed ditch from his land, notifying them of a friendly meeting to be held on the 26th of June, 1895, at 1 o'clock p.m. in the vicinity of his land.

June 12.—A copy of this notice served personally upon Thomas F. Coleman, one of the executors of Dr. Thomas T. Coleman, deceased, and a co-owner, under the latter's will, of lots 2 and 3 and the east half of lot 4 in the 5th concession of the township of McKillop, and also upon the owners of all the other lands to be affected by the proposed ditch.

June 26.—Meeting held when all the owners present except the Colemans, but no agreement arrived at. Requisition by Kelly to the clerk of Logan in the form (E) prescribed by section 13 of the Act for appointment by the township engineer of a time and place to attend and examine the locality, hear evidence, and make his award.

June 27.—Copy of requisition sent to the plaintiff John Roger, the township engineer.

July 7.—Appointment by latter of July 23rd for meeting to be held at the premises sent to clerk, by whom copy sent to Kelly.

July 8.—Notice in Form (F) prescribed by section 14 of the Act sent to the Colemans by registered letter addressed T. F. Coleman, Seaforth, he and his co-owners not residing in the township of McKillop (see section 3, "non-resident," and section 15). This notice admitted to have been received by Coleman.

July 23.—Engineer attends and examines the locality on that and subsequent day or days. Present, T. F. Coleman on the first day but not on the subsequent ones.

July 29.—Engineer makes his award in Form (G) prescribed by section 16, sub-section (2), of the Act, directing construction of ditch and defining portions to be done and manner of doing by the various owners, and, among the others, the work to be done by the Colemans upon lots 2 and 3 and the east half of lot 4 in McKillop.

August 2.—Copy of award filed in office of the clerk of the township of McKillop pursuant to section 18 of the Act.

August 3.—Notice of filing award and of work to be done sent by clerk of McKillop to the Colemans by registered letter addressed to E. C. Coleman, Seaforth, one of the executors of Dr. T. T. Coleman, and a co-owner of the above land, not resident in McKillop. It is admitted that this notice was received by a clerk of Coleman Brothers at Seaforth, but, it is said, was not communicated to them.

Copy of award filed with clerk of Logan and notices sent to all parties interested.

August 9.—Letter signed "The Estate of T. T. Coleman, per E. C. Coleman, Manager," to the clerk of Logan, stating that they had been told by two persons that award had been made, and complaining of want of notice.

August 17.—Last day for appealing from the award under section 22 of the Act.

August 23.—Letter signed "The Estate of T. T. Coleman," to clerk of McKillop, referring to information re-

ceived from clerk of Logan that award made, and complaining of want of notice in time to appeal.

Reply by post card stating that notice sent by registered letter on 3rd August.

August 24.—Further letter signed "The Estate of T. T. Coleman," reiterating denial of receipt of notice.

August 27.—Post card from clerk of McKillop in reply, stating that registered letter was posted on 3rd and should have been received on 5th August, and that time for appealing had expired.

October 10.—Time for completion of work required to be done by the Colemans under the award expired.

Notice from Kelly to the engineer that work not done on the Coleman's lands, and requiring him to attend to it i.e., a notice to inspect (section 28).

October 11.—Letter from E. C. Coleman to clerk of Logan threatening injunction proceedings.

October 16.—Notice from engineer to Coleman Brothers, dated October 15, sent by registered letter addressed "Estate of T. T. Coleman, Seaforth," notifying of appointment of October 23rd, at 4 o'clock p.m., when he will attend in vicinity of premises to let the work required to be done through the Coleman premises.

October 18.—Letter from E. C. Coleman to clerk of Logan, presumably after receipt of the engineer's notice of October 15th, stating that estate has taken legal advice, does not consider it is bound by the proceedings, does not concur in the proposed work, which, if done, must be done at risk of those doing it.

Notices posted as required by section 28 (a) of the Act in three conspicuous places four clear days before October 23rd.

October 23.—Engineer attended and let work to Patrick Gaffney for \$360.38. No one attended for Coleman estate (see section 28).

December 4.—Engineer inspected work done by Gaffney, and made certificate in writing in Form (H) prescribed by section 29 of completion of work and that Gaffney is entitled to \$360.38, and that his own fees are \$18.

Certified copy of above certificate admitted to have been forwarded by clerk of Logan to and received by clerk of McKillop, and notice by him to the Colemans. Section 20 of the Act.

McKillop paid to Logan \$30 costs of the award of the 29th July, 1895, and the Colemans paid to McKillop \$10, their share.

The action was tried at Goderich on the 1st of June, 1897, before Armour, C.J., and he dismissed it, holding that Kelly was not an owner, and that, under *York vs. Township of Osgoode* (1), the proceedings were therefore void.

The appeal was argued before Burton, C.J.O., Osler, MacLennan, and Moss, J.J.A., on the 24th of March, 1898.

Garrow, Q.C., for the appellants. This case is not governed by *York vs. Township of Osgoode* (2). Kelly was an owner within the meaning of the Act, or at all events had a substantial interest in the land: *Ball vs. Canada Company* (3), and that gave him the right to initiate proceedings. [*Moss, J.A., referred to Henrihan vs. Gallagher* (4).] Even if Kelly was not, strictly speaking, an owner within the meaning of the Act, it is now too late to give effect to the objection; the question should have been raised by appeal to the County Judge, and section 24, which was not in force when *York vs. Township of Osgoode* was decided, prevents it from being raised now. It is also objected that proper notice was not given to the Colemans. They were, however, non-residents, and notice was admittedly given to one of them of each proceeding, and notice to one was sufficient: *Doe d. Strickland vs. Roe* (5). If there is anything in the objection it is cured by sections 23 and 24. The proceedings were taken under section 33 and not under section 36, and the two years' limitation does not apply; but if it does, the evidence shows that the previous work had been completed more than two years before the initiation of the present proceedings.

(1) (1892) 24 O. R. 12, (1894) 21 A. R. 168, (1895) 24 S. C. R. 282.

(2) (1892) 24 O. R. 12, (1894) 21 A. R. 168, (1895) 24 S. C. R. 282.

(3) (1876) 24 Gr. 281.

(4) (1862) 9 Gr. 488, (1864) 2 E. & A. 338.

(5) (1846) 4 D. & L. 431.

Shepley, Q.C., for the respondents. Kelly was merely a tenant of the land and not entitled to initiate proceedings. The whole foundation is, therefore, wanting, and the curative sections do not apply. Moreover, notice was not given to the Colemans, who are admittedly owners affected by the work, and without notice the proceedings are void. Even if the proceedings are held to be regular there is no right of action by one township against another: section 38. The engineer did not, as required by the Act, make an estimate of the cost.

Garrow, Q.C., in reply.

November 15th, 1898. Osler, J.A.:—

I think we may uphold the proceedings taken for the construction of this drain and the action of the engineer of the plaintiff township without infringing upon anything that was decided in *York vs. Township of Osgoode* (6).

I rest my decision very much upon the changes made by recent legislation on the subject as found in the Act of 1894, amended by the Acts 58 Vict. ch. 54, sec. 1 (O.), and 59 Vict. ch. 67, sec. 1 (O.), and now found in the Revised Statutes of 1897, ch. 285.

Under the former Act the proceedings, after failure to effect a friendly agreement, were initiated by the filing by the landowner who desired the construction of the ditch in the office of the clerk of the municipality of the requisition mentioned in section 6, and it was expressly enacted that where it was necessary in order to obtain an outlet that the ditch should pass through the lands of more than five owners, the first-mentioned owner being one, the requisition should not be filed unless such owner should first obtain the assent in writing thereto of, including himself, a majority of the owners affected or interested.

In the proceedings in question in *York vs. Osgoode*, this negative provision had been disregarded, the requisition not having been sufficiently signed in consequence of two of the landowners' names having been omitted therefrom altogether,

while one of the signatories, the person who was setting the proceedings in motion, was found not to be in law an owner. The foundation of jurisdiction was absent, and the Act attaching no effect to the result of an appeal or the omission to appeal, there was nothing to prevent an owner of land affected by the award of the engineer from objecting to the award at any time before it had been acted upon by the construction of the drain upon his own land.

By the new Act, section 5 (1), every ditch to be constructed under the Act shall be continued to a sufficient outlet, but shall not pass through or into more than seven original township lots, exclusive of road allowances, unless (which was not the case to be provided for here, the drain in question being within the limit) the council of the municipality upon the petition of a majority of the owners of all the lands to be affected should pass a resolution authorizing its extension. Then section 7 (1) enacts that any owner (other than the municipality) shall, before commencing proceedings, file with the clerk of the municipality in which the land requiring the drain is situate a declaration of ownership thereof in the form prescribed, and, by sub-section (2), that in case of omission to file such declaration of ownership at the time aforesaid the Judge of the County Court "may, in case of such ownership at said time," permit it to be filed at any stage of the proceedings upon such terms as he may impose or direct.

Then, the declaration of ownership having been filed, the next step to be taken by the declarant before taking compulsory proceedings and calling in the engineer is to serve upon the owners and occupants of the other lands to be affected a notice of a friendly meeting, at which all the owners may settle the matter among themselves and enter into an agreement for the construction of the ditch. If they fail to do so, then the owner requiring the ditch, who has already filed a declaration of ownership, files with the clerk of the municipality a requisition in the prescribed form, requesting that the engineer be asked to appoint a time and place to make an examination of the locality and an award under the Act.



Passing over the sections relating to the proceedings of the engineer, section 22 provides for an appeal to the County Judge within fifteen clear days after the filing of the award by any owner dissatisfied therewith. The appeal is to be by notice in writing, shortly setting forth the grounds of the appeal. Section 24, which is a new clause, enacts that "every award made under the provisions of this Act shall after the lapse of the time hereinbefore limited for appeal to the Judge, and after the determination of appeals, if any, by him, where the award is affirmed, be valid and binding to all intents and purposes notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act."

One of the objections mainly relied upon by the defendants is that Timothy Kelly, the person who set the proceedings in motion, was not entitled to do so, not being the "owner" of the parcel of land requiring the ditch. His title was that of lessee of the Canada Company with the usual option of purchase at a named price.

This objection is not raised by the pleadings nor had it been set up at any stage of the proceedings in question. It seems to have been suggested quite incidentally in the course of the trial. But whether well founded or not I am of opinion that it is not open to the defendants. Kelly made and filed a declaration of ownership as required by section 7 (1). That, together with the requisition required by section 13, constituted the foundation of the jurisdiction of the engineer. Obviously the Legislature attached some importance to the declaration as something to be placed on record in the clerk's office showing or alleging the right of the declarant to institute the proceedings. It was prescribed for the first time by the Act of 1894. If it is omitted to be filed at the proper time the omission must be supplied and that can only be done by the order of the County Judge upon being satisfied that the party who should have filed it was the owner at that time. In that case the Judge enters upon an enquiry. If he

determines that the party was the owner and allows the declaration to be filed, can his adjudication afterwards be reviewed otherwise perhaps than by himself on appeal from the award? In my opinion it cannot. If, then, a declaration of ownership filed by permission of the County Judge sufficiently establishes the ownership for the purpose of the proceedings taken under the Act, it seems to follow that the proper time and place to impeach it, where it has been filed without such order, is at latest on appeal from the award to the same Judge. If he may enquire into the question of ownership of the declarant at one stage it seems to me that the Act intended it must also be the subject of appeal to him at another. Prima facie the declaration having been filed the engineer had jurisdiction, and if all proceedings under the award have been taken without any attack having been made upon his jurisdiction by an appeal in the prescribed manner, the fullest effect ought to be given to the new section 24, and the award held to be valid and binding to all intents and purposes notwithstanding any defect in form or substance, either in the award itself or in the proceedings taken under the provisions of the Act. That the declarant was not the legal owner would seem to be a considerable defect in substance in the proceedings, yet it is quite reasonable that it should be cured by the omission of owners of other lands to object to it at the proper time. How unreasonable it is that they should lie by as they have here done until after all works under the award have been completed is forcibly pointed out in the judgments of my learned brothers. I think it was the intention of the new Act that this should no longer be possible, and therefore that the objection as to the declarant's ownership fails.

It was next contended by the defendants that the notice required to be given under section 8 of the Act, i.e., of the friendly meeting, had not been given to persons named Coleman, the owners of lots 2 and 3 and the east half of lot 4 in the 5th concession of McKillop, and also that those required by section 14 of the appointment by the engineer were not served upon these parties. They were executors and trustees

of the will of their deceased father. They held the lands as devisees under the will and were beneficially interested therein. The first notice was served upon T. F. Coleman, the second was addressed to him and came to the notice of E. C. Coleman, his co-trustee, and he with the latter's knowledge attended on the ground on one of the days during which the engineer was making his examination. These two co-owners were between them the managers of the estate, and there can be no reasonable doubt upon the evidence that both notices came to the knowledge of each of them. I think this is all that is reasonably necessary having regard to the provisions of section 23, which enacts that the award shall not be set aside for want of form only or on account of want of strict compliance with the provisions of the Act.

It was further objected that the proceedings had been taken, not under section 33, for deepening, widening, etc., of the ditch made under the McKenna award, but for reconsideration of that award under section 36.

Here, again, if necessary to invoke them, the proceedings are saved by sections 23 and 24. No doubt, in form, the requisition speaks of reconsideration, but it was "the proposed ditch" for which the engineer was to make his examination and award. What was needed was an extending, and deepening and widening of the old ditch. That was what all the parties were thinking of at the friendly meeting and the engineer's examination, and that was the subject of the award which, as I have said, was not appealed from. The defect in form of the requisition is consequently cured.

Lastly, it is said that the engineer made no estimate of the cost of the ditch, showing that it was not in excess of the statutory limit, \$1,000, and that was a condition precedent to his jurisdiction.

What the Act says, section 5 (2), is that no ditch, the whole cost whereof according to the estimate of the engineer or the agreement of the parties will exceed \$1,000, shall be constructed under the provisions of the Act. The engineer did, in fact, make an estimate, as appears by his award—on what principle I confess I cannot understand—but of a

sum very much below what would necessarily be the actual cost of construction, but also below the sum of \$1,000, and it was proved that the actual cost of construction was not anything like the latter sum. There is nothing in the objection.

The plaintiffs are, therefore, entitled to recover from the defendant township, under section 20 of the Act, the sum certified by the plaintiffs' engineer to be due to the contractor for the cost of constructing that part of the ditch which the Colemans should have made under the award through their own land, together with interest thereon, and the costs of the action and the appeal.

Whether under the obligation imposed on the defendants under section 20, which seems to be different from that imposed by the corresponding section of the former Act, R. S. O. 1887, ch. 220, sec. 26, they had the right to set up the defences they have relied upon, I have not considered, as no point was made upon that. Neither do I express any opinion as to the position of persons whose lands are affected by a drain, but who have not been described as owners in the proceedings for its construction; nor upon any question which may be raised with regard to the validity of proceedings dependent upon the resolution of the council passed under section 5 (1).

The appeal should be allowed.

MacLennan, J.A.:—

The Act under which the proceedings, which are the subject of this action, were taken, namely, 57 Vict. ch. 55 (O.), is different in several respects from the Acts upon which the case of York vs. Township of Osgoode (7), referred to by the learned Chief Justice, was decided. The later Act contains a definition of the word "owner," section 3, and also a declaration that after the time for appealing against the award has elapsed, whether an appeal has been taken or not, an award shall be valid and binding, notwithstanding any defect in form or substance either in the award or in the proceedings.

The objection to which the learned Chief Justice gave effect was that Kelly was not an owner within the meaning of the Act. Kelly's title was a lease from the Canada Company, dated the 2nd of April, 1895, at an annual rent of \$54, and containing a covenant by the company that if the lessee, having been guilty of no default at any time, should at any time during the term pay the lessors \$1,350 in addition to all rents and taxes the lessors would convey the land to the lessee in fee simple. Kelly had had a previous lease for several years on similar terms, and it was not suggested that he had been in any default. The first question, therefore, is whether the learned Chief Justice was right in holding that Kelly was not an owner. One of the definitions of an owner under section 3 is "a person entitled to sell and convey the land," and I am clearly of opinion that under the covenant of the Canada Company Kelly is such a person. All he has to do is to pay the company the sum agreed upon, and he then becomes the owner to all intents and purposes, with full power to sell and convey. The circumstance that he must pay for the land first cannot make him less an owner, within the definition, than if he had exercised his option and paid his money, but had not got his conveyance; or than a person, who being owner, had mortgaged his land for a large sum. The essential part of the definition is his right and power to sell and convey, he being a person "entitled" to do so. In *York vs. Osgoode*, this Court was careful to say that even under the former Act a substantial interest, though less than freehold, would suffice.

I therefore think the judgment cannot be upheld on the ground on which it was rested by the learned Chief Justice. The judgment was, however, supported on other grounds, and principally on the want or insufficiency of notice to persons of the name of Coleman through whose land the ditch passes. That land had belonged to one T. T. Coleman, who, having made his will, died in 1893. By his will he gave and devised all his estate, real and personal, to his executors, namely, his wife and two of his sons, all of whom accepted probate. The whole estate was given upon trust to pay debts,

to hold his residence and household effects for the use of his wife for life, and at her death for her four children equally, as to the rest of all his property, one-third was to be held in trust for his wife absolutely, and the remaining two-thirds for his children equally. The executors were authorized to carry on the testator's business for a period not exceeding five years, and any profit or loss was to belong to the estate. The estate was not to be finally divided until all his businesses in which he was engaged should be wound up; but they might divide any property not required for the business at any time when convenient. At the time of the proceedings in question there had been no division of the lands affected by the ditch, and those lands were therefore held by the executors upon the trusts which have been mentioned. The testator's business had been that of a manufacturer of salt and agricultural implements, and had been carried on at Seaforth, where he resided, and at the time of the transactions in question the business was still carried on at Seaforth by the executors. Neither the executors nor any of the testator's family resided on the lands in question. In the award and the papers which preceded it, the persons named as interested in the Coleman lands are described as Coleman & Bros., and the evidence is that the executors and beneficiaries were not notified of the proceedings separately and individually. The notice required by section 8 was served upon T. F. Coleman, one of the executors, and that required by section 14 was received by E. C. Coleman, another of the executors, who communicated it to T. F. Coleman, and the latter attended upon the ground while the engineer was examining it for the purpose of his award. A copy of the award was duly posted by registered letter by the township clerk of McKillop to E. C. Coleman, on the 3rd of August, as required by section 18, and was received by a clerk who had authority to do so, although Coleman says it was not delivered to him in time to enable him to appeal against it. It is objected that each executor and each beneficiary should have been notified, and that the proceedings are invalid. I am of opinion that the notices were sufficient. Section 15 provides that notices shall be served

personally or by leaving at the place of abode of the owner or occupant, with a grown up person residing thereat, and in case of non-residents, then upon the agent of the owner, or by registered letter addressed to the owner at the post office nearest to his last known place of residence. It is admitted that neither the executors nor any of the beneficiaries were resident upon the land or in the municipality in which it is situate, but were, therefore, non-resident within the meaning of the Act; therefore the award was duly served upon E. C. Coleman at all events, although his clerk may not have delivered it to him. The other notices were also duly served upon two of the executors, for it is admitted that they came to the personal knowledge of two of them, and were acted upon by them. The only question then is whether it was necessary also to serve all the executors, and I do not think so. The statute defines an owner (section 3) to include the executor or executors of an owner, and section 15 authorizes service upon an agent of the owner or even upon an occupant of the premises, or any grown up person residing thereon. Now E. C. Coleman and T. F. Coleman were not only executors but also beneficiaries of the estate, and describe themselves as managers, and it is admitted that they did in fact, at an early stage of the proceedings, attend to the business. In many cases it has been held that notice to one executor is sufficient. In *Doe d. Strickland vs. Roe* (8), it was held that service on one executor was sufficient in ejectment, and *Smith vs. Smith* (9), and *Meux vs. Bell* (10), are other cases in which notice to one executor was held to be notice to all.

It was also objected that the proceeding was under section 36 for the reconsideration of the old award, and that it was of no effect inasmuch as two years had not elapsed since the completion of the construction under the former award. I do not think section 36 has any application to a case like the present of deepening and widening a ditch already constructed. This is provided for by section 33, in

(8) (1846) 4 D. & L. 431.

(9) (1833) 2 Cr. & M. 231.

(10) (1841) 1 Ha. 73.

respect of which there is no limit of time imposed. Section 36 is for the reconsideration of the agreement or award, but says nothing about new work. It deals with a completed work, and all that would be left for reconsideration after two years from completion would be its maintenance, as to which, upon reconsideration, a new agreement or a new award might then be made. See also section 34. The initiatory notices in this case do speak of reconsideration, but it is reconsideration not of the old award, but of an award drain for the draining of the applicant's land, and with the object of agreeing upon the respective portions of the work and materials to be done and furnished by the several owners, etc. I think, therefore, this is a proceeding under section 33 for deepening and widening a ditch already constructed, as to which there is no limit of time.

Mr. Shepley also objected that the engineer had made no estimate of the whole cost of the work, section 5 (2), but I think that is not so, for he has distinctly estimated the cost of the work and materials to be done and supplied by each of the contributories, from which the estimated cost of the whole is apparent.

I am, therefore, of opinion that the defences fail and that the plaintiffs are entitled to judgment for the amount claimed under and by virtue of section 20 of the Act.

Appeal should, therefore, be allowed.

Moss, J.A.:—

Under the provisions of sections 20, 27 and 30 of the Act, upon receipt of an engineer's certificate by the clerk of a municipality affected, it becomes the duty of the council to pay the amounts therein mentioned; and apparently payment would have been made by the defendants in this case but for the attitude of the Colemans, who took the position that they were not liable and would resist the collection of the amounts if the defendants sought to collect them out of their lands pursuant to the Act.

The defendants put forward a number of defences to the claim, and at the trial evidence was gone into bearing upon



the question of Kelly's ownership and the regularity of the proceedings leading to the award and certificate.

Kelly holds under a lease from the Canada Company, dated the 2nd of April, 1895, demising the premises to him for a term of seven years from the 1st of February, 1895, at a yearly rental of \$54. The lease also contains a covenant by the lessors that if the lessee shall at any time during the continuance of the term (no default nor breach of covenant having been at any time made by the lessee and not otherwise) pay to the lessors the sum of \$1,350 in addition to all rents due or accruing with interest to the day of payment, and all taxes and rates, the lessors shall convey the land in fee simple to the lessee. There was a former lease for a term of seven years from the 1st of February, 1888, at an annual rental of \$90, which contained a similar covenant for conveyance upon payment of \$1,500. And there is produced a receipt by the Canada Company showing that there is a sum of \$150 at Kelly's credit with the company which is expressed to have been paid by him in consideration of the grant to him of the lease of April 2nd, 1895.

The learned trial Judge ruled that Kelly was not an owner within the meaning of the Ditches and Watercourses Act, 1894, and in this I agree with him.

As shown by the decided cases, Kelly occupies two positions with regard to the land. He is a lessee for years, and in that capacity he is certainly not entitled to claim to be an owner. He is also the holder of an option to become the purchaser of the land upon compliance with certain conditions, non-compliance with any of which before payment of his purchase money would forfeit his right. It does not strengthen his position that the option is given in the same instrument under which he is lessee of the term: *Henrihan vs. Gallagher* (11), *Ball vs. Canada Company* (12), and cases there cited.

The Canada Company is not in a position to compel him to exercise his option and become a purchaser. On the other

(11) (1862) 9 Gr. 488, and in appeal (1864), 2 E. & A. 338.

(12) (1876) 24 Gr. 281.

hand he may forfeit his right under the option by failure to observe the conditions.

I think, looking at the decision in *York vs. Township of Osgoode* (13), and in the Supreme Court (14), and the reasons for it, that Kelly's position is not that of an owner. See also *In re Flatt and Counties of Prescott and Russell* (15), *Helby vs. Matthews* (16), and the very recent case of *Friary Holroyd and Healy's Breweries vs. Singleton* (17).

But it is urged that under the interpretation section in the Act of 1894—which was not in the Act under which *York vs. Osgoode* was decided—"owner" means and includes any person entitled to sell and convey the land, and that Kelly is entitled to sell and convey the land. I do not so read these words. I think they were intended to apply to a person having a power under which he might sell and convey although the estate is not vested in him—a person entitled under a power of sale to convey and pass an estate vested in another. And I think the context supports this view.

I do not regard Kelly as a person entitled to sell and convey the land. He may sell and transfer his interest, but until he has obtained a conveyance from the Canada Company, or at all events has paid his purchase money, he is not in a position to vest the estate in a purchaser from him.

If, therefore, this case resembled *York vs. Osgoode* in other respects and the circumstances and the law were the same as in that case the judgment appealed from ought to be affirmed.

But considerable changes have been made in the Act since the date of that decision, and much that did not come in question in that case has taken place in this.

It may be convenient to deal at this point with the other objection to the plaintiffs' right to which the learned Chief Justice gave effect, viz., that no sufficient notice of the proceedings was given to the owners of the lands belonging to the Coleman estate affected by the ditch.

(13) (1894) 21 A. R. 168.

(15) (1890) 18 A. R. 1.

(14) (1895) 24 S. C. R. 282.

(16) [1895] A. C. 471.

(17) (1898) 15 Times L. R. 23.

These lands had been the property of one Dr. T. T. Coleman, who died in 1893, leaving a will, whereby he gave and devised his estate, real and personal, to his executors to hold upon trust, after payment of debts, as to the property in question with other property, one-third for his wife absolutely, and the remaining two-thirds for his children equally. Directions are given with regard to carrying on his business for a period not exceeding five years and the postponement of the final division until the business should be wound up. At the time of the institution of the proceedings in question there had been no division of the lands affected by the ditch, and the business was being carried on under the style of "The estate of T. T. Coleman," with E. C. Coleman as manager. The executors of the will were the testator's widow and two of his sons, E. C. Coleman and Thos. F. Coleman.

They were, therefore, within the definition of owners in the Act. And having regard to the terms of the will and the manner in which they were dealing with the property at the time, I think service upon any one of them may, for the purposes of the Act, be deemed notice to the owners.

So that for the purposes of the engineer's jurisdiction to proceed under the Act, there was the declaration of ownership duly filed by Kelly and due service upon all the owners of lands affected by the proposed ditch of notice of a friendly meeting to be held on the 26th of June, 1895.

It is true that Kelly, not being an owner within the meaning of the Act, should not have taken the proceedings, and no doubt if any of the parties affected had raised the objection at the proper time the engineer would have deemed it his duty to defer the proceedings to give the party objecting an opportunity of disputing the correctness, and showing the incorrectness, of the declaration.

But the objection was not raised at the friendly meeting, and the Colemans were afterwards served with notice of the engineer's appointment to examine the locality, take the evidence and make his award, and one of them attended on the first day, but no objection to Kelly's status was raised.

Then the engineer's award was made, and it became the duty of the defendants to notify the Colemans of it; and if there was defective notice to them, the defendants cannot be permitted to set it up against the plaintiffs. But, as the evidence shows, the Colemans were notified in accordance with the provisions of the Act, and the defendants were not to blame if the notice was not communicated by the Colemans clerk to his employers.

No objection to Kelly's status was then raised either by the defendants or by Coleman, and Kelly's declaration of ownership under section 7 of the Act, filed in the office of the clerk of Logan on the 11th of June, 1895, remained unquestioned.

Under section 22 either the defendants or the Colemans, or both, might have appealed from the award within fifteen clear days from the 2nd of August, 1895, but no appeal was taken.

Section 24 provides that every award made under the provisions of the Act shall, after the lapse of the time limited for appealing, "be valid and binding to all intents and purposes notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder, taken under the provisions of this Act."

By the award the Colemans were directed to do certain work upon the ditch and to complete it on or before the 10th of October, 1895.

They failed to comply with the direction and thereupon the engineer proceeded under section 28 to inspect the ditch, and after service of notice upon the Colemans and posting of the other notices required to be posted in conspicuous places in the neighbourhood, to let the work to the plaintiff Gaffney for \$360.38. Gaffney performed the work, and the engineer thereupon made his certificate, upon which this action is brought.

The amount claimed, therefore, is for the performance of work to be done under the award, and under the provisions of sections 20, 27 and 30, the plaintiffs became entitled to payment by the defendants' council.

Can the defendants at this stage, when all the work directed to be done by all the owners, including that directed to be done by the Colemans, has been done, set up for the first time in an action to recover for work done under the award the objection that Kelly was not an owner within the meaning of the Act?

Should not the award and the certificate with reference to proceedings relating to work done under the award be deemed conclusive and binding upon the defendants? Or should they not be taken to have waived the objection and to have agreed to treat Kelly as the owner for the purposes of the proceedings?

It is to be observed that in the correspondence following the making of the award no objection is raised to Kelly's status as an owner. The complaint is of want of notice.

The declaration of ownership made by Kelly, and the notices of the friendly meeting and the failure to reach an agreement within the prescribed period thereafter, were sufficient to give the engineer jurisdiction to take the proceedings which resulted in the award and certificate.

It is nowhere made his duty to enquire *ex mero motu* into the correctness of the declaration, and in the absence of objection he and all the other parties to the proceedings may properly conclude that it is unobjectionable.

I cannot doubt that the intention of the Legislature was to make the declaration of ownership indisputable if not impeached in good season, and I think that is the effect of the Act.

It was open to the Colemans in the initiatory stages and to the defendants upon receiving a copy of the engineer's award to have questioned Kelly's ownership and put an end to the proceedings by showing the incorrectness of the declaration, and I think they should have done so then. As remarked by Erle, J., in the course of the argument in *In re Jones vs. Jones* (18): "Jurisdiction is sometimes contingent; in such case if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards."

It appeared in that case that the defendant had been served with an order from which it appeared as if the leave of a Judge to bring the action in the Court had been obtained, although it had not in fact been obtained; but this did not assist the defendant in his subsequent application for a prohibition: See *Moore vs. Gamgee* (19).

The engineer's award was made with the acquiescence of all parties. It was not appealed from. Was he not then justified in proceeding to let to Gaffney the performance of work ordered to be done by the award and not done by the owners? And was not Gaffney entitled to rely upon the award and the provisions of the Act which make the council of the municipality in which he performs the work liable to pay him for it?

If not, neither the engineer nor any contractor under him could safely undertake to perform any service under the Act without first enquiring into every proceeding. I do not think the Act imposes this task upon them. It is sufficient, I think, for the engineer to know that a declaration of ownership has been filed, and that the prescribed notices have been properly served, and for the contractor to know that an award has been made and has not been set aside on appeal.

It was also argued on the appeal before us that there was want of jurisdiction because the engineer has made no estimate of the cost of the whole work so as to ascertain whether this was a proper case for proceeding under the Act. But I think it appears from the award and otherwise that a sufficient estimate was made and that upon it the engineer was justified in proceeding.

It was also objected that the proceeding was one for reconsideration under section 36, and that two years had not elapsed since the completion of the ditch made under the former award.

I think it is shown that this proceeding was under section 33 and not under section 36, but at all events, the evidence sufficiently establishes that the former drain, although

an imperfect drain, had been completed according to the terms of the award more than two years before the filing of Kelly's declaration of ownership.

I think the appeal ought to be allowed and judgment entered for the plaintiffs with costs.

Burton, C.J.O.:—

After some fluctuation of opinion, and contrary, I must confess, to my first impression, I have, after consideration, come to the conclusion that the judgment appealed from should be affirmed.

I am unable to agree that under the definition given in the interpretation clause of the present Act, 57 Vic. ch. 55, sec. 3 (O.), Kelly, the party initiating the proceedings, was an owner within the meaning of the Act. He had nothing but an option, which does not enable him to sell and convey the land. Test it in this way: could the Canada Company, as proprietors of the fee simple, have initiated or taken part in initiating proceedings under the Act? If so, there would be two owners of the same property.

The present Act contains a provision not to be found in the former ones, which, in addition to the preliminary proceedings, requires a declaration of ownership to be filed before their commencement, but that declaration has to be made by a person who is an owner; if filed by a person who is not, the fact that a declaration has been made will no more give the engineer jurisdiction than would the filing of the requisition under the former Act unless there is some legislative declaration that it shall have that effect unless objected to within a reasonable time.

Section 10 providing that certain informalities in the proceedings under sections 8 and 9 are not fatal does not reach the case, nor do I see before whom the objection could have been taken. A prohibition might have been applied for, but if the engineer was without jurisdiction the proceedings, including the award, are invalid.

Section 22 assumes that the engineer had jurisdiction to make the award, and empowers the Judge to correct errors in it or set it aside if he finds the engineer has acted partially or improperly, but I think that section 24 does not extend to anything more than to make the award valid, notwithstanding any defect in form or substance either in the award itself or any proceedings relating to the works to be done thereunder, but does not give jurisdiction to the engineer to make an award when the proceedings have been initiated by persons who had no authority to take them.

If such an objection were taken before the engineer it does not appear to me that he would have any power to deal with it. He might well say, that is not a matter which I am authorized or competent to decide; if it is a valid objection I should imagine that your proper course would be to apply to the proper Court to prohibit me from proceeding. I find the notices prescribed by the statute have been given, and that being so my duty is pointed out in section 16 and subsequent sections.

If the statute had said that filing the declaration should be sufficient until set aside to warrant the engineer in assuming the initiating party to be an owner within the meaning of the statute, it would have been a different thing, but upon the best consideration I have been able to give to the matter there is nothing to show any waiver on the part of the Colemans or these defendants, or anything to estop them from objecting to the want of jurisdiction of the engineer. If that view be correct, it is not necessary to consider the other objections.

I quite agree that when once the jurisdiction is established the Court ought to strive as much as possible to uphold the proceedings against any formal objection, but this objection goes to the root of the proceedings and is not one of form.

I have carefully read and considered the judgments prepared by my learned brothers, holding that the Colemans and all others are now estopped in this action against the



municipality from raising this objection. There is great force in the reasoning in favour of that view and everything in favour of that being the law, and after reading them my mind is left, I must confess, in great doubt, but as my judgment cannot affect the result, I think I must adopt the rule which has grown into a proverb, "that gravely to doubt is to affirm." I feel that under these circumstances I ought not to interfere with the decision of the Court of first instance, and I do this the more readily as it is to be hoped that the Legislature, finding this grave difference of opinion, will place the matter beyond doubt by providing that if the objection is not taken within a specified time the proceedings shall be valid to all intents and purposes.

I am, I confess, much pleased that the majority of the Court have been able to come to a different conclusion, which ought to be the law if it is not.

Appeal allowed, Burton, C.J.O., dissenting.

SUPREME COURT OF CANADA.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

THE CORPORATION OF THE TOWNSHIP OF MCKILLOP,  
(*Defendant*) APPELLANT

AND

THE CORPORATION OF THE TOWNSHIP OF LOGAN  
AND OTHERS, (*Plaintiffs*) RESPONDENTS.

(Reported 29 S. C. R. 702.)

*Ditches and Watercourses Act, 1894 (Ont.)—Owner of Land—Declaration of Ownership—Award—Defects—Validating Award—57 Vict. ch. 55—58 Vict. ch. 54 (Ont.).*

A lessee of land with an option to purchase the fee is not an owner who can initiate proceedings for construction of a ditch under the Ditches and Watercourses Act, 1894, of Ontario.

Township of Osgoode vs. York (24 Can. S. C. R. 282), followed.

If the initiating party is not really an owner the filing of a declaration of ownership under the Act will not confer jurisdiction.

Section 24 of the Act, which provides that an award thereunder, after expiration of the time for appealing to the Judge, or after it is affirmed on appeal, shall be binding notwithstanding any defects in form or substance either in the award or any of the proceedings does not validate an award or proceedings where the party initiating the latter is not an owner.

Appeal from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of Armour, C.J., at the trial.

This appeal involved the validity of an award by an engineer under the Ditches and Watercourses Act, 1894, of Ontario, the award being attacked on the ground that Kelly, who initiated the proceedings for construction of a ditch on which the award was made was not an "owner" under the Act, being only a lessee of land though holding an option to purchase the fee. The Court of Appeal upheld the award

(1) 25 Ont. App. R. 498.

\*Present:—Sir Henry Strong, C.J., and Taschereau, Gwynne, King and Girouard, JJ.

on the ground that an objection to the declaration of ownership could not be taken after the award was filed.

Shepley, Q.C., for the appellant.

Garrow, Q.C., and Thompson, for the respondents.

The Chief Justice:—

I am of opinion that this appeal must be allowed.

It may be assumed in the respondent's favour that this was not a proceeding for the reconsideration of the former award made by McKenna, but an original proceeding under section 33. This was the opinion of a majority of the learned Judges in the Court of Appeal, and I am willing to accept their view as the correct one, though without any intention of pronouncing decisively on the point.

That Kelly was not an owner within the meaning of that word as used in the Act of 1894, is, I think, established by the authority of *Osgoode vs. York* (2) in this Court. The Act of 1894 contains an interpretation clause which the former Act under which *Osgoode vs. York* (1) was decided did not contain, but it does not define the meaning of the word "owner" standing alone, and we must therefore attribute to that word the same meaning which was given to it in the previous decision referred to. This interpretation clause, however, declares that the word "owner" shall mean and include not only an "owner," but any person entitled to sell and convey the land. This expression "the land" clearly would not apply to a mere chattel interest; it can only mean an absolute estate, the fee simple, and was doubtless intended to apply to persons having not an estate but a mere power to convey the whole interest, the fee simple. Then Kelly was neither an owner nor a person having such a power; he was a mere lessee for years, having, it is true, an option to purchase the fee, which option, however, he had never elected to exercise, and under which he could only obtain a title upon the condition that he duly performed the covenants of the lease and paid his purchase money.

I have, therefore, no doubt that Chief Justice Burton was right in holding that Kelly was not an owner, and therefore, not a person entitled to put the machinery of the Act in operation. The learned Chief Justice points out a test which may be applied to ascertain if Kelly was an "owner" within the Act; he asks could not the Canada Company, Kelly's lessors, have initiated proceedings such as these, as owners? Beyond all doubt they could, having the fee. Then, as there cannot be two owners in severalty of the same land, is not this conclusive to show that Kelly was not one? I think this is unanswerable.

I cannot agree that the mere filing of the declaration, whether true or not, was sufficient to attach the jurisdiction conferred by the Act. There are good reasons for saying that no one who has not a substantial interest in the land should be able to take advantage of the provisions of the Act imposing as it does a burden on neighbouring proprietors. If the mere filing of the declaration was a sufficient answer to the objection that Kelly was not an owner, the declaration would be a mere senseless formality. What was intended was that no person other than one having the interest required by the Act should be able to put the proceedings in force. This appears from the Act itself. The provision added by section 1 of the Amending Act (58 Vict. ch. 54), that in case of omission to file a declaration of ownership the Judge may permit one to be filed at any stage of the proceedings "in case of ownership" (by which is meant if the party actually is the owner), is alone sufficient to show that in order that the Act should apply the fact of ownership is required. The case of *Osgoode vs. York* (3) is, therefore, a conclusive authority in favour of the appellant unless section 24 of 57 Vict. ch. 55 applies. That clause is as follows:

"Every award made under the provisions of this Act shall after the lapse of the time hereinbefore limited for appeal to the Judge, and after the determination of appeals, if any, by him where the award is affirmed, be valid and binding

to all intents and purposes notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act."

This, in my opinion, is entirely insufficient to cure an objection such as that which has been taken, not to the form or substance of the award, but to the acquisition by the engineer of jurisdiction to make an award. The language is too plain to need any interpretation. The proceedings other than the award which are covered by this section are not the proceedings to be taken anterior to it for the purpose of putting in operation the machinery of the Act, but those "relating to the works to be done thereunder." It is, I think, manifest, that this is not conclusive on the appellants.

Mr. Justice Moss has held that the appellants were bound by acquiescence or equitable estoppel. As to this I am of opinion that such a defence is not applicable in statutory proceedings of this kind. Moreover, it is not shown that the parties acquiesced with their eyes open after having acquired knowledge of the defect in the initiatory proceedings, an element always essential to the principle of equitable estoppel. But there is not the slightest pretence that as regards the defendant municipality, the present appellant, there was in fact anything like acquiescence even if the doctrine could be applied in such a case as the present. The result is that we are bound by the decision in *Osgoode vs. York* (4) to hold that all the proceedings were void, and consequently that the appellants have come under no such liability as that sought to be enforced against them.

The appeal must be allowed with costs, and the judgment of Chief Justice Armour restored; the appellants must also have their costs in the Court of Appeal.

Taschereau, J., concurred.

Gwynne, J.:—

This is an action in which the corporation of the township of Logan as plaintiffs seek to recover from the defendants

a sum of money claimed to be due to the plaintiffs as a statutory debt in virtue of the provisions of the Ontario Statute 57 Vict. ch. 55, intituled "An Act respecting Ditches and Watercourses," passed in substitution for a previously existing statute of like title as amended by 51 Vic. ch. 35 and 52 Vict. ch. 49, and 53 Vict. ch. 68, which several statutes were repealed by 57 Vict. ch. 55. In an action of this nature it is, I think, the undoubted right of every person upon whom such a statutory debt is sought to be imposed, to insist that the plaintiff should establish by incontrovertible evidence that the provisions prescribed as necessary to the creation of the debt claimed have been complied with in the minutest particulars, and accordingly the only defence which is offered to this action is that the plaintiffs have failed to establish that such provisions of the statute have been complied with. It appears that prior to the passing of the Act 57 Vict., and sometime in the year 1893, a ditch or watercourse was at the instance of one Timothy Kelly commenced to be constructed from lot No. 35, in the 5th concession of the township of Logan, across the town line between the townships of McKillop and Logan, and across lots Nos. 1, 2, 3, 4 and 5, in the 5th and 6th concessions of the township of McKillop, under the supervision and direction of one McKenna, a P. L. S., who was then engineer of the said township of Logan. Sometime prior to the 28th day of August, 1894, but when in particular does not appear, McKenna ceased to fill that office. Upon that day the corporation of the township of Logan passed a by-law whereby one John Roger, P.L.S., was appointed "engineer of the said township under the provisions of the Ditches and Watercourses Act." The ditch so commenced to be constructed was proceeded with in pursuance of an award assumed to have been made by McKenna, as engineer of the township of Logan, under the provisions of the Ditches and Watercourses Act then in existence, but the award was not produced. When the ditch so constructed was completed, or what were its dimensions as designed and as constructed, does not appear; all that we know upon this subject is that Mr. Roger testifies that he first saw the ditch

in July, 1894, and he could not say whether it was then completed or not for that there was no bench mark to go by, but he says that in October of that year after he was appointed engineer of the township he considered that if it had been completed it must have fallen in, and for that reason he, of his own motion, caused it to be cleaned out, and when such cleaning out work was done he says that the ditch was put into complete order. The lots Nos. 2 and 3 and the east half of lot No. 4, in the 5th concession of McKillop across which the McKenna ditch was constructed was the property of one Timothy T. Coleman, who departed this life on the 29th July, 1893, having first duly made and published his last will in writing by which he devised all his property, subject to the payment of his debts, unto his wife and his sons T. F. Coleman and E. C. Coleman (whom he also made executrix and executors of his will) in trust to hold the same upon certain trusts in his will stated. The length of the McKenna ditch across lots 2 and 3 and the east half of lot 4, in the 5th concession of McKillop was 201 7-10 rods, and just one-third of the whole length of the ditch, and the cost of its construction across these lots to the Coleman estate, apart from the cleaning out work done in October, 1894, under the order of Mr. Roger, was upwards of \$230, and the cost of such cleaning out work \$40, making in the whole upwards of \$270. Now the statute in sections from 7 to 15, both inclusive, prescribes the manner in which alone the powers conferred by the Act for the "construction" of a ditch (which the interpretation clause defines to be "the original opening or making of a ditch by artificial means") shall be brought into operation and who are the persons competent to invoke such provisions, and from these, it plainly appears that, with the exception of municipalities, it is only an owner of land who can invoke and bring into action those powers which when exercised under the provisions of the Act have the effect of imposing a burthen upon other lands and the present and future owners of such other lands. Sections 7 and 8 are very precise upon this point, as indeed also are sections 13, 14 and 16. Then sections 16 to 20, inclusive, prescribe the proceed-

ings to be taken by the engineer (when his services are duly called into action by compliance with the previous provisions of the Act in that behalf) for taking into consideration the subject matter of the requisition by which his services are invoked, and for making an award thereon and for filing the same, and for the service thereof upon the parties affected thereby.

Section 36 enacts that

“Any owner, party to the award, whose lands are affected by a ditch, whether constructed under this Act or any other Act respecting ditches and watercourses, may at any time after the expiration of two years from the completion of the construction thereof take proceedings for the reconsideration of the agreement or award under which it was constructed, and in every such case he shall take the same proceedings and in the same form and manner as are hereinbefore provided in the case of the “construction of a ditch.”

Now, Timothy Kelly, who was a party to the McKenna award and the one at whose instance the proceedings in which it was made were taken, and because, as he says, of the McKenna ditch seeming to him not to work satisfactorily in so far as the north half of lot 35 in the 5th concession of Logan was concerned, did upon the 11th of June, 1895, make and file a declaration of ownership wherein he declared that he was the owner in fee simple of the north half of the said lot, and upon the same 11th of June he wrote several notices in the form produced and filed as exhibit three, which notices, in the view which I take, may be admitted to have been respectively duly addressed to and received by the several persons who were owners or occupants of the several lots mentioned in the McKenna award and across or upon which the McKenna ditch was constructed. These notices so addressed severally commenced as follows:

“Sir,—I am, within the meaning of “The Ditches and Watercourses Act, 1894,” the owner of the north half of lot No 35, in the 5th concession of the township of Logan, and as such I require to reconsider an award drain made under



the provisions of the said Act for the draining of my said land."

This requisition was transmitted by the clerk of the township of Logan to and was received by Mr. Roger, the engineer of that township, and it constituted his sole authority, if any he had, to act thereunder, and notwithstanding that this requisition called merely for a reconsideration of the McKenna award, the engineer proceeded, as appears upon the face of his award, as if he was proceeding under the Act for the original construction of a ditch. True it is that the section 36 requires the owner of land who takes proceedings for the reconsideration of an award under which a ditch has been previously constructed to take the same proceedings, and in the same manner and form as prescribed in the Act for the original construction of a ditch, but it by no means says that upon a requisition for reconsideration of an award under which a ditch has been constructed, the engineer may make an award as if he was acting under a requisition calling for the "construction" of a ditch where as yet there was none constructed. Now the engineer by his award assumed to direct that Timothy Kelly, the person making the requisition for reconsideration of the previous (McKenna) award under which alone the engineer was acting, "should make, complete and maintain" a ditch upon the north half of lot 35, in the 5th concession of Logan, between certain specified points, and should furnish therefor 250 feet of 5-inch tile, the cost of all which the engineer estimated at \$10; this work either wholly or in part was within the limits of the McKenna ditch. Then where the McKenna ditch crossed the town line between the townships of Logan and McKillop, from the north half of lot 35 in the 5th concession of Logan to Lot No. 1 in the 5th concession of McKillop, the award assumed to direct that the corporations of said townships jointly should "make, complete and maintain" a ditch across the said town line at a cost estimated by the engineer at \$8. The award in like manner assumed to direct that one Thomas Levy as owner of the north half of lot No. 1 in the 5th concession of McKillop should make, complete and maintain a ditch

within certain specified points upon that lot at a cost estimated by the engineer at \$12; all this work was also within the limits of the McKenna ditch. Then as to lots 2 and 3, and the east half of lot 4, in the 5th concession of McKillop, the award assumed to direct "Coleman Brothers" as owners of these lots to make, complete and maintain a ditch across them within certain specified points, also within the limits of the McKenna ditch, at a cost estimated by the engineer at \$30. In like manner across the west of lot No. 4 in the said 5th concession of McKillop, the award assumed to direct one Michael Walsh as owner of such west lot to make, complete and maintain a ditch at a cost estimated by the engineer at \$2; and so in like manner the award assumed to direct one Patrick Walsh as owner of lot 5 in the 5th concession of McKillop to make, complete and maintain a ditch on that lot within certain specified limits at a cost estimated by the engineer at \$5. The McKenna ditch at this point entered the 6th concession of McKillop on lot No. 1, and continued across that lot and lots 2, 3, 4, and 5, in said 6th concession, and the award in like language as above, assumed to direct the several persons named therein as owners of said respective lots to make, complete and maintain a ditch across the said several lots within specified points therein respectively, at a cost estimated by the engineer as follows: On lot No. 1, at \$1; on lot No. 2, at \$2; on lot No. 3, at \$3; on lot No. 4, at \$1.50; and on lot No. 5, at \$12. The whole of this work so directed to be done within the township of McKillop was directed to be done within the limits of and upon the McKenna ditch, and the total cost was estimated by the engineer at \$89, including the work directed to be done by Kelly, on lot 35 in the 5th concession of Logan, at the estimated cost of \$10. It may be that what the engineer has by his award ordered to be done might have been directed to be done under an award expressed to be made under a requisition for reconsideration of a previous award, and in such case the award might have been amended under the 22nd section of the Act, but the objection relied on upon this point is not that the work ordered to be done by the engineer's award was not

of a character which could have been ordered by an award made upon a requisition for reconsideration of a previous award, but that upon a requisition for reconsideration of a previous award no valid award could be made nor could any proceedings be taken for reconsideration of a previous award until after the expiration of two years from the completion of the ditch constructed under the previous award. That the parties in the township of McKillop named in this award took no steps to comply with the directions in the award appears by the evidence of Kelly and by a letter addressed by him and sent to the engineer, Roger, in October, 1895, which is as follows:

Logan, October 10th.

Lot 35, in 5th concession.

Sir,—I hereby give you notice that the parties on the west end of the drain leading from me have done nothing at it yet, and as the time is up I want you to attend to it at once.

Yours truly,

TIMOTHY KELLY.

When Mr. Roger received this notice he had knowledge that the Coleman estate repudiated the validity of the award, and he had received one or more letters from that estate upon that subject, but such letters and all notices and papers which he ever had relating to the proceedings in the matter he says he destroyed when the time for appealing against his award had expired, with the exception of the requisition under which he acted. Upon receiving from Kelly the above notice of the 10th of October, he says that he went up to the ditch upon the lots 2 and 3, and east half of 4, in the 5th concession of McKillop, and found that no work had been commenced there, nor upon lot No. 1 in the said 5th concession, which was the only lot lying between the Coleman Trust estate and lot 35 in Logan, and he says he made no inspection to ascertain whether anything had been done below the east half of lot No. 4 in McKillop; he proceeded, he says, against the Coleman estate alone, and professing to act under section 28 of the statute he let to one Gaffney, at the sum of \$360.38,

the work on lots 2 and 3 and the east half of lot 4 in McKillop, which in his award he had estimated at \$30, and subsequently he gave to Gaffney a certificate that he had completed the work so let to him, and was entitled to receive from the township of Logan the said sum of \$360.38, together with \$18 for engineer's fees, which sum the said township in virtue of that certificate paid to Gaffney, and the township now brings this action to recover from the township of McKillop the said sums amounting to \$378.38 as a statutory debt due to the township of Logan under sections 29 and '30 of the Act. The township of McKillop authorities not being able to understand how they could collect \$378.38 as an assessment upon lands, the whole of which was rented at \$200 per annum, and being notified by the Coleman estate trustees that they regarded the award as wholly invalid, and that they would resist any attempt to levy such sum from the estate, took the advice of their solicitor, who advised them not to pay unless compelled by judgment in an action. Accordingly the present action has been brought in the course of which it was urged, as part of the contention of the Coleman trust estate, that the work ordered by the Roger award was absolutely of no benefit whatever to their lands in McKillop, and that in point of fact the sole object and intent of that work was for the benefit of lot 35, in the 5th concession of Logan, and it may be of other lands in that township. That contention would, it may be admitted, have been a good objection to the award upon an appeal under the 22nd section of the statute, and the Coleman trust estate could have obtained adequate and perfect relief in so far as that objection is concerned under the provisions of that section, but no such contention can be entertained as a defence in the present action.

Then again, it was urged as another part of the Coleman trust estate contention that the letting by the engineer at the sum of \$360.38, work upon the lots 2 and 3, and the east half of 4, in the 5th concession of McKillop, estimated by him at \$30, was an arbitrary, collusive and illegal proceeding, but if any actionable wrong was committed by the engineer by

his letting the work as he did, upon which I express no opinion, that was a wrong against the Coleman trust estate and the proper subject of an action at the suit of such estate, but cannot I think be entertained as a defence to the present action.

The action was tried by the learned Chief Justice of the Queen's Bench Division of the High Court of Justice for Ontario, who upon the authority of *Osgoode vs. York* (5) in this Court, held that the whole of the proceedings taken by Timothy Kelly were illegal and void for that he was not the owner of the north half of lot 35 in the 5th concession of Logan, and he was therefore incompetent to initiate proceedings under the statute, and that for such his incompetency all the proceedings taken and the award made therein were wholly null and void. That he was not the owner of that lot conclusively appeared by his own title deed produced from his possession for the purpose of establishing the truth of the averment necessarily inserted in the plaintiff's statement of claim that he, as owner of the said lot, had instituted the proceedings in which the award was made. This title deed was merely an indenture of lease dated the 1st of February, 1895, for a term of seven years at a certain rent thereby reserved, and executed by the Canada Company, the owners in fee of the said lot by the said indenture of lease demised. This indenture of lease was subject to a proviso for re-entry by the lessors upon breach by the lessee of any of his covenants therein contained, which covenants are of such a special character; so unequivocally affirmatory of the fact that the lessors are the owners of the lot so demised, that it is difficult to conceive how Kelly could have supposed himself to be (as in the declaration of ownership filed by him is alleged) owner of the lot. If the statute required a declaration of ownership to be filed by way of some moral assurance and security to the parties to be affected by the proceedings, that they should not be troubled by an incompetent person assuming to initiate proceedings under the Act, this case shows how

inadequate such contemplated security is. The Court of Appeal for Ontario reversed the judgment of the learned trial Judge for the reasons, first, that in the opinion of some of the learned Judges in appeal clause seven of the Act of 1894, which was first enacted after the decision in *Osgood vs. York* (6), dispensed with the necessity of the party initiating proceedings being an owner, or that the filing of the declaration of ownership required by that section was to be taken as conclusive evidence of the party filing such declaration being the owner of the land as therein alleged; and secondly, that after the expiration of time limited by the Act for appealing against an award all objections are removed by section 24 of the Act. That the filing of a declaration of ownership cannot be held to be substituted for the fact of ownership by a party initiating proceedings under the Act or accepted as conclusive evidence of ownership by such party not only appears from sections 7 to 15 inclusive, in the former of which it is naturally enacted that it is an owner alone who can before instituting proceedings file the declaration of ownership therein required, but ch. 54 of 58 Vict. passed for amending sec. 7 of 57 Vict. ch. 55, is conclusive upon the point, for this Act enacts as a proviso to the section 7, that in case of omission by an owner through inadvertence or mistake to file his declaration of ownership before instituting his proceedings under the Act, the Judge may permit the certificate to be filed at any stage of the proceedings (instituted by the owner), provided that the ownership in fact existed at the time of the commencement of the proceedings. There can, therefore, I think, be no doubt that the Act is peremptory that no one but an owner of land is competent to initiate proceedings under the Act, and that no award made in proceedings instituted by a person who was not an owner of land is of any validity whatever. For this reason, and for the reason also that the plaintiffs have failed to show that two years had elapsed subsequently to the completion of the work ordered by the McKenna award before the institution

by Kelly of his proceedings for reconsideration of that award, but that the contrary sufficiently appears in the evidence. I am of opinion that the appeal must be allowed with costs and the judgment of Chief Justice Armour dismissing the plaintiff's action, restored.

The 24th section of the Act has application only to awards and proceedings taken "under the provisions of the Act," and has no application, therefore, to awards made in proceedings taken by a person not competent under the provisions of the Act to take such proceedings, or to proceedings taken for a purpose at a time when for such purpose the proceedings are not warranted by the provisions of the Act.

King and Girouard, JJ., concurred.

Appeal allowed with costs.

F. Holmested, solicitor for the appellant.

Dent & Thompson, solicitors for the respondents.

## IN THE HIGH COURT OF JUSTICE.

TURTLE ET AL. VS. TOWNSHIP OF EUPHEMIA.

(Reported 31 O. R. 404).

*Ditches and Watercourses Act—Award—Engineer—Appointment—Revocation—Notice—Jurisdiction—Estoppel—Appeal.*

By section 4 (1) of the Ditches and Watercourses Act R. S. O. ch. 285, it is provided that "every municipal council shall name and appoint by by-law (Form A.) one person to be the engineer to carry out the provisions of this Act, and such engineer shall be and continue an officer of such corporation until his appointment is revoked by by-law (of which he shall have notice) and another engineer is appointed in his stead, who shall have authority to commence proceedings under this Act or to continue such work as may have been already undertaken."

The defendants' council duly appointed R. such engineer, and he accepted the office. Subsequently they, without any notice to him, and without any by-law expressly revoking his appointment, duly passed a by-law purporting to appoint S. as such engineer; the latter by-law in no way referring to the former or to R.:

Held, that the prior appointment had not been revoked; that S. did not become "the engineer;" and that an award purporting to be made by him as such engineer under the Act was invalid.

S. was not de jure the engineer, because R.'s appointment had not been revoked by by-law, either with or without notice to him; nor could the defendants assert that S. was de facto the engineer, for he had not the reputation of being the engineer.

Quære, whether the notice required is one of intention to revoke or of having revoked.

Held, also, even supposing that consent could confer jurisdiction, or that the plaintiffs might waive or be estopped from urging an objection to S.'s jurisdiction, that there was no reasonable evidence of any such consent, waiver, or estoppel; for the plaintiffs' requisition called for "the engineer," and they were ignorant that R. had not been properly superseded. The point was raised upon an appeal against the award and was overruled; but, as it went to the root of the jurisdiction of the whole proceedings, including such appeal, there was nothing in such proceedings which could prevent a consideration of the question now.

This was an action brought to enjoin the defendants from enforcing an award made by one Angus Smith, purporting to act as the engineer of the defendants, the corporation of the township of Euphemia, under the Ditches and Watercourses Act, in respect to a ditch adjacent to the respective



lands of the plaintiffs in the township, and to compel them to provide means for carrying away the water descending through a road side ditch, and for damages for injuries sustained by reason thereof. The facts are stated in the judgment.

The action was tried at Sarnia before Meredith, J., without a jury, on the 27th November, 1899.

T. G. Meredith and Dromgole, for the plaintiffs.

W. J. Hanna, for the defendants.

February 8, 1900. Meredith, J.:—

The plaintiffs attack an award purporting to have been made under and pursuant to the provisions of the Ditches and Watercourses Act; and their first contention is that it was not made by any person authorized by law to make such an award: and if they be right in that contention the award is invalid and entirely without legal force or effect, and none of the saving clauses of the Act can help it; unless, indeed, these plaintiffs be in some way precluded from the benefit of such contention. The power to make any such award is wholly statutory, and, unless made by the person empowered to make it, is not an award under the Act at all. The objection is a formidable one.

Then, was the award made by a person unauthorized to make it?

The Act provides that it shall be made by one person to be named and appointed by the municipal council to be the engineer in their municipality to carry out the provisions of the Act; that the municipal council shall by by-law name and appoint such engineer, and that he shall be and continue an officer of the corporation until his appointment is revoked by by-law (of which he shall have notice), and another engineer be appointed in his stead.\*

The municipal council of the defendants appointed James Robertson such engineer, in manner provided by the Act, on the 27th day of April, 1895; and he accepted the office and acted and continued in it.

\* The Ditches and Watercourses Act, R. S. O. ch. 285, sec. 4 (1).

On the 12th day of February, 1898, they, without any notice to such engineer, and without any by-law expressly revoking his appointment, passed a by-law purporting to appoint Angus Smith as such engineer; in both cases of appointment using the form prescribed by the Act; the latter by-law in no way referring to the former or the engineer appointed by it.

The main question is: Has the first appointment been revoked, as the Act expressly requires? If not, the plain words of the Act are that James Robertson is and continues in office; and so Angus Smith never became "the engineer."

Everything turns upon the meaning of the enactment; the case in this respect is not one depending, in any sense, upon any common law rights or rules. The Legislature has said who is to be and continue the engineer, and the Act alone must be looked to to find out which of these two persons is de jure the engineer, for there can be but "one person" who is "the engineer:" sec. 4.

Clearly and admittedly James Robertson was the engineer; and, clearly and admittedly, if his appointment has not been revoked by by-law (of which he has had notice) he is and continues such engineer; the plain words of the Act require it.

So that it comes down to this: Can the revocation by by-law (of which the engineer shall have notice) be by implication arising from the passing of a by-law purporting to appoint another to the office, in form as if the office was vacant; and does any such implication arise? That is, it comes down to this apart from any question as to notice of the by-law.

Now, the words of the Legislature are: "Shall be and continue . . . until his appointment is revoked by by-law (of which he shall have notice) and another engineer is appointed in his stead:" that is, appointed, as the Act before provides, by by-law (form A.).

The three things are expressly required: revocation by by-law, notice, and the appointment by by-law of another "in his stead."

The revocation by by-law of which there has been notice is not enough; he still continues in office until another is appointed in his stead.

Have I any right to say that the mere appointment of another is sufficient. The Legislature has not said so; its first requisite is revocation by by-law of which there shall be notice. Can I rightly disregard that, and hold it to be of no effect? Can I rightly hold that the Act may be read as if those provisions were completely blotted out, as if the only requirement were the appointment of another by by-law? That must be done if Angus Smith is de jure the engineer. There is no escape from it.

Now, whatever notions I might have of the necessity for, or wisdom of, that which the Legislature in plain words provides, I must give effect to it. I have no right to adjudicate away any part of an enactment because it might seem to me needless. And I would go further and say, that where the Legislature has provided for revocation by by-law, notice, and an appointment by by-law, I have no right to say that the first is included in the last, and therefore it was a waste of words to provide for the first; but rather, if ordinarily that might be said, I ought to consider that the Legislature intended them to be treated as separate and distinct things under this Act.

It is surely but right to give the persons who made this law credit for both knowing and saying that which they meant, and saying no more than they meant.

And the facts of this particular case, in my judgment, shew that there was no waste of words, but that the three requirements of the Act were not unwisely provided.

The facts I refer to are these: Mr. Robertson had been for several years the engineer; the municipal corporation was in respect of its roads directly and considerably interested in the drainage in question; they had in the year 1897 initiated proceedings under the Act in respect of this drainage; and in those proceedings this engineer made an award which was not in accordance with the wishes of the municipal council; that award was for some technical defect set aside in June of that year; in February following the by-law appointing Mr. Smith was passed, and in July following his award was made

on proceedings initiated by the plaintiff Turtle—an award requiring the construction of a drain commencing not upon the plaintiffs' land but upon the defendants' highway, and running along that highway more than half its distance, doing the work of a road ditch and taking water by the road side ditch a distance from the point of commencement greater than the Act permits to be assessed for benefit so derived: a course entirely different from Mr. Robertson's, and one quite in accordance with the wishes of those who had so recently appointed Mr. Smith in Mr. Robertson's place, or intended and endeavoured to do so.

Where persons have the power of appointment of the judges of their own cases, every prerequisite to such an appointment may, by their opponents, be fairly considered a matter of something more than mere form.

It is begging the question to say that the appointment of Mr. Smith to the single office of engineer must necessarily have ousted Mr. Robertson from that office; for the question is: Has Mr. Smith ever been duly appointed; has he ever become the engineer?

It does not require authority for the proposition that where an office is held during will or pleasure the appointment of another to that office is a sufficient expression of the determination of the will or pleasure under which theretofore it had been held: a sufficient determination of all right of the person theretofore holding under such will or pleasure. But Mr. Robertson did not hold office at the mere will or pleasure of the municipal council; it was by virtue of the enactment, by the mandate of the Legislature, that he was continued in that office until the three things before mentioned were done; and not having been done, the attempt to appoint Mr. Smith was futile, in my opinion.

Other enactments of the same Legislature seem to me to support the views I have expressed as to this enactment; the Municipal Act provides (sec. 282) that every council shall appoint a clerk and (sec. 288) a treasurer and (sec. 295) assessors and collectors and (secs. 299 and 300) auditors; and (sec. 321) that all officers appointed by the council shall hold office

until removed by the council. So that such officers hold office at the pleasure of the council, and in cases where the appointment should be made annually, but is not, the last mentioned section prevents a vacancy until action is taken by the council. Section 300 expressly provides that the Toronto auditors shall hold office during the pleasure of the council; and sec. 8, subsec. 28, of the Interpretation Act, provides that all officers appointed by the Lieutenant-Governor shall hold office during pleasure only. The difference in the language of the Act in question shows that the tenure of the engineer is to be something different. If sec. 321 of the Municipal Act applies to him, it must be that in his case the office shall be held until he is removed by the council in manner provided for in the Act in question, that is, by by-law revoking his appointment, of which he shall have notice, and by by-law appointing another in his stead: so giving full effect to both Acts.

I have spoken fully upon the absence of a by-law revoking Mr. Robertson's appointment; and shall now add a few words on the want of notice of such a by-law.

In the first place, it will be observed that it is not notice of the appointment of another that is required; the appointment of another is expressly required, and it must be by by-law, but no notice of it is required or mentioned; the three things are treated as separate and distinct, a by-law of revocation, and notice, and then a by-law of appointment.

Now, it does not seem quite clear to me whether the notice is of intention to revoke or of having revoked the appointment; the more literal reading of the section points to the latter, but there is very much to be said in favour of the former; having regard to the works upon which the engineer may be engaged at the time, and also to the power of the municipal council to appoint even where the municipal corporation is directly interested in the work, it may well have been thought that there should be some hearing by the council of objection to their proposed action, if any, before they could exercise the power conferred on them. But, however that may be, I have found as a fact that no notice of the by-law in question was given to Mr. Robertson. In the spring of the year (1898) he acquired some knowledge of it, probably through

the newspapers, and afterwards during that season had some conversation with the township clerk in a casual way upon the subject; but no written notice was ever given to him; and, if verbal notice would do, I cannot consider such knowledge so acquired as equivalent to notice: see *The Queen vs. Saddlers Co.* (1), *Hill vs. The Queen* (2), and *Vernon vs. Corporation of Smith's Falls* (3).

In my opinion, Mr. Robertson continued and Mr. Smith was not de jure the engineer under the Act when the award in question was made.

Then, can the defendants say that Mr. Smith was at all events de facto the engineer? If so, this attack upon the award must fail, for it would be intolerable if such an act of such a public officer would invariably depend for its legality upon the regularity of his appointment. And this consideration is at first sight very apt to prepossess one in favour of the defendants upon this branch of the case; but second thoughts make it very plain to me that this principle cannot be applied in the defendants' favour; that they, at all events, cannot assert that Mr. Smith was de facto the engineer. In order that that character can be established it is first necessary, in such a case as this, that the man should have had the reputation of being the engineer. How can those who so recently attempted to appoint him say that he had the reputation of being the engineer? They are supposed to have known the law, and they knew the fact that Mr. Robertson's appointment had not been revoked, and they probably knew that no notice was given, and that Mr. Smith's appointment was not made in his stead; for they seem to have treated the office as vacant at the end of each municipal year and to have passed a by-law each year filling the vacancy all through Mr. Robertson's term, as well as when they attempted to appoint Mr. Smith.

It is a great pity that none of the council nor the clerk took the trouble to read the Act; for if they or he had, it is highly probable that they would have done just what the Act literally requires, and to avoid any difficulty would have given the notice both before and after passing the by-law. It

(1) (1863), 10 H. L. C. 404. (2) (1852-4), 8 Moore P. C. 138.

(3) (1891), 21 O. R. 331.

is very improbable that any of them would have had that little knowledge which would have made it dangerous to have thought, and procured action upon the idea, that under this Act a by-law appointing is also a by-law revoking, and that notice is immaterial.

I am of opinion that these defendants cannot support the award on the ground that it was made by one who was *de facto* though not *de jure* the engineer: see *Rex vs. Corporation of Bedford Level*(4), and *Speers vs. Speers* (5).

These seem to me to be the main features of this branch of the case, though little, if at all, relied upon in the argument for the defendants.

Mr. Hanna's substantial contention was that there was a waiver of this objection to the award; and that the plaintiffs were estopped by their conduct from raising it.

It has been said that there cannot be any estoppel in such a case as this, where there is a complete want of jurisdiction, and of course consent cannot (unless it is so provided) confer jurisdiction, though it has always seemed to me quite reasonable to say that, though consent cannot confer jurisdiction, a party may yet be estopped from showing want of jurisdiction, that is, he may be precluded from raising the point.

But, assuming that consent could confer jurisdiction, and that the plaintiffs might waive, or be estopped from urging, the objection; there is no reasonable evidence of any such consent, waiver, or estoppel against either plaintiff—very certainly none against the plaintiff Elliott.

The plaintiff Turtle's requisition called for "the engineer;" it was the act of the township clerk that brought in Mr. Smith instead of Mr. Robertson; this plaintiff had nothing to do with that; the blame rests with the council and the clerk, if he were not the engineer. Neither plaintiff knew who was the engineer; they had no doubt heard that Mr. Smith had been appointed; but there is nothing whatever to show that they knew, or either of them knew, that Mr. Robertson's appointment had not been revoked by by-law of which he had had notice. The point was raised upon the appeal against the award and was overruled; but, as it goes to the root of the jurisdic-

tion of the whole proceedings, including the proceedings on the appeal, neither that opinion nor anything in the appeal proceedings can prevent a consideration of the question now.

Upon this first ground of attack upon the award the plaintiffs must, in my judgment, succeed, and it therefore becomes unnecessary for me to consider any other of the several objections made against its validity.

The defendants will, accordingly, be restrained by perpetual injunction from enforcing the award against the plaintiffs.

The defendants being unprepared to meet the other branch of the plaintiffs' claim at the trial, it was there agreed, between the parties, that there should be a reference to the proper local officer of all matters in question between the parties therein. It will, therefore, be referred to the local Master at Sarnia to ascertain and state what, if any, damages the plaintiffs or either of them have or has sustained by reason of the matters complained of in the 4th, 5th, and 6th paragraphs of the plaintiffs' statement of claim, and whether or not the plaintiffs, or either of them, should have any, and if any what, injunction in respect thereof.

If the plaintiffs elect to take a reference, further directions and all questions of costs of the reference will be reserved until after the Master has made his report.

If a reference, the plaintiffs will have their costs of the action in any event, other than the costs reserved; if no reference, they will have their costs of the action forthwith.

Before parting with this case it may not be amiss to suggest to the parties the imagination of the substantial and effective system of drainage which the amount expended in the costs of this action might have procured for them: or the still more handsome structure (a sort of miniature Thames embankment in earth) which the amount which must yet be expended in costs would buy if the case go on through the several stages of appeal open to it; nor to add that, no matter what the eventual outcome of the litigation, they might find it more profitable to have a new award made by a competent and impartial engineer—one who has not expressed or formed any opinion upon the subject yet—to be duly appointed by the defendants' council.



## COURT OF APPEAL, ONTARIO.

MCCRIMMON vs. TOWNSHIP OF YARMOUTH.

(Reported 27 O. A. R. 636.)

*Water and Watercourses—Ditches and Watercourses Act—Railway.*

An award under the Ditches and Watercourses Act directed that a drain should be built by the initiating owner a certain distance along a highway of the defendants, then by the defendants along the highway to a point opposite the land of a railway company, then by another landowner, and then by the railway company along the highway, or across the highway through their own land, as far as might be necessary to give a proper outlet. The drain was built by contract under the Act as far as the point opposite the railway company's land, but the railway company, whose railway had been declared to be a work for the general advantage of Canada, refused to recognize the award or do the work directed. The defendants then built a culvert across the highway and brought the water to the railway company's land, and the railway company thereupon built an embankment to keep it back, the result being that it overflowed from the highway ditches and caused damage to the plaintiff:—

Held, that there was no jurisdiction under the Ditches and Watercourses Act as far as the railway company were concerned: that the award was, therefore, no protection to the defendants; that the damage resulted from the construction of the culvert; and that the defendants were liable therefor.

Judgment of Rose, J., affirmed.

Appeal by the defendants from the judgment at the trial.

The action was brought to recover damages for injuries caused by overflowing water, and was tried at St. Thomas, on the 9th of November, 1899, before Rose, J., who, on the 16th of February, 1900, gave the following judgment:—

Rose, J.:—

The plaintiff, suing on her own behalf as well as on behalf of her children, and on behalf of the estate of Edward McCrimmon, deceased, her husband, claims from the defendants, the township of Yarmouth, damages for injury to property, and to her own health and the health of her husband, causing his death from disease, induced by the unsanitary condition of the property, all alleged to have been the result of the flooding

of her land by water, said to have come down through a drain on the highway of the defendants.

The plaintiff alleges that the cause of the trouble was the alteration of the drainage of the land to the rear and south and east of her property, changing its course from that which it would have followed naturally, and causing it to flow by her property to a culvert so negligently constructed as not to carry off the water, causing it to flow upon her property.

The real attack upon the defendant corporation at the trial was for permitting water which flowed through what is called the "award drain" to come down through the drain upon the construction road to be discharged upon the plaintiff's property.

Lands owned by one Bailey were to the east and north and some distance from the plaintiff's property. Bailey desired to drain his lands, and in 1892 took proceedings under the Ditches and Watercourses Act. An award was made by the engineer on the 28th of May, 1892, directing Bailey to construct the first section of the drain; the defendant corporation to construct the second section; one J. A. Smith to construct the third section; and the Canada Southern Railway Company the fourth section. The sections directed to be constructed by Bailey and the township were to be made of tiles; a portion of that to be constructed by Smith was to be a tile drain; and the balance an open drain. The railway company had the option of making an open drain or a tile drain.

The drain was to commence at a point in the highway in front of Bailey's land, and was then to run along the highway to a point opposite the land of the Canada Southern Railway Company, and then across the highway into the company's land, or again along the highway, to a sufficient outlet.

Bailey constructed his portion of the drain; the township refused or neglected to construct its portion, and the engineer, under the Act, let that portion to be constructed. I cannot find upon my notes whether it paid for the construction, as provided for by the statute. I have asked the reporter to refer to his notes, and he is unable to find any reference to the payment. I have an impression that something was said about

it at the trial, but it does not, in my view, become material, or, at least in view of what I shall hereafter say, it is not necessary to delay the giving of judgment to ascertain how the fact was. Evidence of the fact may be supplied, if in the future history of the case it becomes a material question.

Smith constructed his portion of the drain, and in addition put a culvert or tile drain across the road from the end of the award drain to the railway fence. The effect of this was to throw the water upon the railway lands and allow it to go where it naturally would. The railway company put a bank of earth up so as to throw the water into the drain on the construction road, and it found its way down to and upon the plaintiff's land. For this extra work Smith was paid by the township. The railway company did not recognize the validity of the award, and did no work in pursuance of it.

I do not think that the company was subject to the jurisdiction of the engineer under the Act. See *Miller vs. Grand Trunk R. W. Co.* (1). Nor do I think it was subject to the *Railway Ditches and Watercourses Act*, R. S. O. ch. 286, which is confined to ditches, etc., "situate on the property of any such railway company and running along or under the railway:" sec. 5 (1); and therefore the scheme of the engineer did not provide for a proper outlet, for by the award he directed the company "to carry it to a proper outlet without damage to adjacent lands, giving said ditch a fall of not less than one inch in four rods."

I assume, without deciding, that the township was not bound to obey the direction of the award, and that it did not and would not by reason of any act of the engineer become responsible for water which went down the award and construction road drains. See *In re Stonehouse and Plympton* (2), *Gray vs. Town of Dundas* (3). And I assume further, without deciding, that if when Bailey allowed the water from his land to enter the award drain it was incomplete and had no proper outlet, and thus was discharged upon the plaintiff's land, he was the wrongdoer and not the township.

(1) (1880), 45 U. C. R. 222.

(2) (1897), 24 A. R. 416.

(3) (1886) 11 O. R. 317.

But it seems to me, without deciding these questions, that the evidence of Smith so connects the township with the conducting of the water which flowed through the award drain from Bailey's property, as to make it responsible for any injury which happened to the plaintiff. True, its object was, no doubt, to throw the water upon the railway land and compel the railway to provide for it, the theory being, as I understand it, that but for the railway embankment the water would have found its way northerly across the land occupied by the railway, and so away from the land of Smith.

The fact, however, remains that the corporation did interfere with the water coming down the Bailey drain, and did undertake to give it a direction and to send it wherever it might go. The railway company had the right to make a bank to dam back the water and prevent it coming on its property, and the result of the embankment was to throw the water into the drain on the construction road, which subsequent to the agreement between the railway and the township became a township road.

I find as a fact that the water which came down through the award drain and through the construction road drain found its way to and on the plaintiff's property and did some damage.

[The learned Judge then dealt with some further alleged causes of damage, depending upon questions of fact, and directed that there should be a reference as to damages unless the defendants consented to have them fixed at \$150, the plaintiff being willing to accept that sum. He also held, upon the construction of certain agreements, that the defendants had no right to indemnity claimed by them against the Canada Southern Railway Company, who had been brought in as third parties.]

Judgment was subsequently entered in the plaintiff's favour for \$150, with costs, and the claim of the defendants against the third parties was dismissed with costs.

The appeal was argued before Armour, C.J.O., Osler, MacLennan, Moss, and Lister, J.J.A., on the 26th of September, 1900.

Aylesworth, Q.C., and J. M. Glenn, for the appellants. If any injury has resulted it has been caused by the award drain, and the defendants are not liable; the only remedy, if there be any, is under the Act. At the least all the parties to the drainage scheme are equally liable, and there cannot be an attack on one. The appellants did not ask for the drain and should not be made to suffer because it has, as constructed, proved injurious to the plaintiff. A party to the scheme has no right of action, and an outsider is in no better position. See *Murray vs. Dawson* (4), *Hepburn vs. Orford* (5), *Dalton vs. Ashfield* (6), and *Seymour vs. Maidstone* (7). The engineer has, subject to the right of appeal, full control of the work, and no party brought in by him should be made responsible for his mistaken view of the best course to take. If the railway company had complied with the award there would have been no resultant injury, and they should be made responsible and not the appellants. [The learned counsel also dealt fully with the question of indemnity.]

D. W. Saunders, for the third parties. The Ditches and Watercourses Act does not apply to the railway company: 53 Vict. ch. 60 (O.); 54 Vict. ch. 50 (O.); *Miller vs. Grand Trunk R. W. Co.* (8), and they were therefore justified in refusing to obey the award, and have done nothing to make them liable; they had the right to keep the water off their land. Moreover, no claim is made against them directly, and the indirect claim to indemnity is not sustainable upon the facts.

W. A. Wilson, for the respondent. This is the simple case of sending water upon another's land without legal right, for the award is no protection and that is the only thing really relied on: *Ostrom vs. Sills* (9), *Fitzgerald vs. Ottawa* (10). The drainage scheme was in itself defective and useless, and the engineer assumed to exercise jurisdiction over the railway company when he had no right to do so, and on either ground the award is void. It is also bad because it directs that the

(4) (1867), 17 C. P. 588.

(5) (1890), 19 O. R. 585.

(6) (1899), 26 A. R. 363.

(9) (1897) 24 A. R. 526.

(7) (1897), 24 A. R. 370.

(8) (1880), 45 U. C. R. 222.

(10) (1895), 22 A. R. 297.

(1898), 28 S. C. R. 485.

ditch shall commence not on the land of the initiating owner but on the land of another person. The appellants could have appealed from the award; and not having done so and having brought the water to a point from which it could not escape without causing injury to the plaintiff, they are responsible.

Aylesworth, in reply.

November 13th, 1900. Armour, C.J.O.:—

[The learned Chief Justice first dealt with the claim to indemnity, and held that it failed. He then read the Bailey requisition and award, and continued.]

No one of the parties—W. E. Bailey, the Township of Yarmouth, and J.A. Smith—performed that portion of the work by the said award adjudged to be performed by such party, and such portions were let by the engineer to J. A. Smith, who performed them and was paid therefor.

The Canada Southern Railway Company paid no attention to this award and did nothing thereunder. Their railway was by the Act of the Dominion, 37 Vict. ch. 68, declared to be a work for the general advantage of Canada, and they were not, therefore, subject to the Ditches and Watercourses Act.

After the award was made, the corporation of Yarmouth instructed J. A. Smith to construct from a point in the award drain, on the south side of the construction road, a culvert to the north side of the said road to carry the water brought down by the award drain upon the railway lands, which culvert he constructed, and was paid for it by the corporation, but the railway company prevented the water from being so carried upon their lands by constructing an embankment thereon.

Eventually the water brought down by the award drain appears, by the plans put in at the trial, to have been carried in an open drain along the south side of the construction road for about 400 feet from the end of the award drain, and then to have been carried by a culvert to the north side of the road, and thence by an open drain along the north side of the road to the approach to the overhead bridge, on the allowance for road between lots 7 and 8, and through the tile placed in the

approach to the west side of the said allowance for road, and thence southerly along the west side of the allowance for road to a swale.

From the allowance for road between lots 7 and 8 through this swale a ditch had been dug, originally, it was said, by the Canada Southern Railway Company, when they dug the ditch down to the swale along the west side of the allowance for road, as before mentioned.

This ditch was carried westerly between Warehouse Street and Steele Street (these streets running from the allowance for road between lots 7 and 8, and at right angles thereto to Park Avenue), and southerly till it reached Steele Street, close to the south-east corner of the plaintiff's land, when it was carried along Steele Street and through a culvert at Park Avenue.

The plaintiff's land was bounded on the west by Park Avenue, on the north by Warehouse Street, and on the south by Steele Street.

This ditch was joined at the allowance for road by a drain carrying water from the south-east off the lands lying in that direction.

The plaintiff's case was that, after the construction of the award drain and the waters therefrom were brought into this ditch, they caused the ditch to overflow and the water to spread over her land, and that the culvert on Steele Street at Park Avenue was not of sufficient size to allow the water carried down by the ditch to pass freely through it, and such water was thereby penned back upon her land.

It is quite clear upon the evidence that all the water carried by the award drain, and indeed all the water brought upon the construction road between the award drain and the allowance for road between lots 7 and 8, would in its natural course have flowed to the north and upon the lands of the railway company, and not towards or to the plaintiff's lands.

There is no doubt that the water carried by the award drain increased very materially the body of water brought into the ditch running past the plaintiff's lands, and was the cause of the overflow of the ditch, and of the insufficiency of the culvert.

It was contended, however, that the corporation of Yarmouth were made parties to the award of the engineer against their will, and that no action could be brought against them for any injury sustained by reason of the water carried by the award drain.

But I do not think it fair to infer that they were made parties to the award against their will, for, in my opinion, the engineer had no power, except with their consent, to initiate the drain upon the allowance for road upon the requisition of Bailey that the drain should be initiated upon his land, and this being so, it is fair to infer that they gave their consent to what would otherwise have been a wrongful interference with the highway.

It is shown, moreover, that they actively interfered to extend the drain beyond the part of it adjudged to be made by them, by directing the construction of a culvert across the road, from the end of the award drain, as constructed, to throw the water carried by the award drain upon the lands of the railway company.

And it is shown that they carry the water from the award drain by means of drains on their highways into the ditch running past the plaintiff's land, and they are liable for the consequences of so doing.

It is quite clear, I think, that the corporation of the township of Yarmouth have no remedy over against the Canada Southern Railway Company for the damages recovered by the plaintiffs against them, for they did not arise either directly or indirectly "on account of the said alterations and diversions," but solely by reason of the acts of the said corporation themselves.

The appeal must be dismissed with costs.

Osler, J.A.:—

The award under the Ditches and Watercourses Act appears to have been without jurisdiction, on the ground that, providing as it does for carrying the waters through the grounds of the Canada Southern Railway Company, who were not subject to the Act, no outlet was provided for them, and



the whole scheme was incomplete and defective. It may be, also, that the engineer had no authority to direct the drain to be constructed except upon the lands mentioned in the requisition, but as to this I do not think it necessary to pronounce an opinion. The defendant township, then, must be taken to have permitted the drain to be constructed on the highway. I will take it that there is no proof that they paid for the part which was allotted to them to construct, but they have permitted the water to accumulate in the drain upon the highway, whence it passes into another drain, from which, it not having capacity sufficient to receive and discharge it, it flows over the plaintiff's land to her injury. The construction by the defendants of the culvert from the end of the award drain across the highway to the lands of the Canada Southern Railway Company, though it became ineffectual and useless in consequence of the refusal of the company to receive the water, so that it passed back to the point of discharge from the award drain, is some evidence of the adoption by the defendants of the latter drain as a part of their drainage system, and, on this ground, I think the judgment below in favour of the plaintiff may be supported. I can see no pretence for saying that the railway company, under their agreements with the township respecting the diversion of Talbot Street, or the township by-law, or under any of the facts appearing in the evidence, are bound to indemnify the township for the damages they are thus condemned to pay to the plaintiff.

The appeal must be dismissed with costs.

Lister, J.A.:—

It is undisputed that the drain known as the "award drain" was made entirely upon and along the south side of the public highway, and that it was constructed under the assumed authority of an engineer's award bearing date the 28th of May, 1892, made under the Ditches and Watercourses Act, R. S. O. 1887, ch. 220, on the requisition of, and for the purpose, as therein stated, of enabling one W. E. Bailey to properly cultivate his lands. The award directs and orders

the Canada Southern Railway Company to "open up and properly construct and maintain either an eight-inch tile drain or open drain carrying the water in its natural course, which is directly north, into the railway grounds, or conducting it along the roadway in its present course; but, in any case, to carry it to a proper outlet without damage to adjacent lands, giving said ditch a fall of not less than one inch in four rods, said work to be completed by the 15th day of June, A.D. 1892."

It will be seen that the scheme or plan was that the waters of the award drain should be discharged in and upon the lands of the company, which are situate to the north of the road, and not through the defendants' drain. It is admitted that the defendants did not construct any part of the award drain which, under the award, they were required to construct, and that such work was let by the engineer under the assumed authority of the Act, and, I assume, was paid for by the defendants.

The railway company having refused to do the work which, under the award, they were required to execute, i.e., the construction of the culvert across the highway to their own lands, the defendants constructed it, and the company thereupon threw up an embankment to prevent, and which in fact did prevent, the water of the award drain from being discharged upon their lands, with the result that such waters were discharged into and found their outlet in the road drain on the south side of the road, and were thereby carried to connecting drains, belonging to the defendants, down to and past the plaintiff's lands.

The evidence, I think, makes it reasonably clear that the award drain, by reason of there being no outlet to the north, collected and discharged into the defendants' drain a considerable volume of water, which, in times of freshet, in consequence of the incapacity of the defendants' drain to carry it off, overflowed and injured the plaintiff's lands.

The learned trial Judge's judgment rests upon the ground that, because the defendants by the construction of the culvert interfered with the water coming down the award drain,

and undertook to give it a direction, they are liable to the plaintiff without regard to whether what they did, did or did not result in injury to the plaintiff. I am, with much respect, unable to assent to this proposition. No doubt what the defendants did with regard to the culvert was unauthorized, but unless their interference with the drain caused damages to the plaintiff, she would not be entitled to maintain her action merely because of such interference. If it were clear that the effect of the culvert was to divert a portion of the water brought down by the award drain, and thus to some extent avert injury to the plaintiff's land, it could not, I think, be well argued that the defendants had incurred any responsibility for the damage actually sustained merely because of their interference. If, then, an action could not be maintained when the interference operated as a benefit, it certainly could not, as it seems to me, be maintained when, in fact, no injury could be attributed to such interference.

In the present case the evidence fails entirely to show that the construction of the tile culvert occasioned any injury to the plaintiff. It was an eight-inch culvert with, I assume, sufficient fall to conduct the water to the railway lands, and there is no evidence to show that with the embankment water did or could escape from the culvert, or that if it did it could in any way cause any injury to the plaintiff.

The evidence of the plaintiff is that the drainage to the east, south and west of her lands, except in so far as it has been changed by the award drain, is in the same position and condition as it was at the time she acquired such lands, and that she suffered no injury from water until after the award drain was made; and she does not seem to complain of any injury due to the neglect of the defendants to maintain their drain. Clearly, unless the award can be regarded as valid, the work done under it was unauthorized. I agree with the learned trial Judge that, under the circumstances here, the engineer had no jurisdiction to order or compel the railway company to execute any part of the work or to direct that the water of the award drain should be discharged upon their

lands, and I am of opinion that in so far as it professes to affect them, it has no force.

The question then arises, is the award valid in respect of the other parties affected by it? I do not think it is. The plan or scheme contemplated by it, as I have already pointed out, was to conduct the water to the railway lands by the construction of a culvert across the highway. This culvert was essential to the proper carrying out of the scheme; without it water in greatly increased quantities would necessarily be discharged into the road drain, which was manifestly incapable of carrying it off without damage to lands to the east, and that such in fact was the result is established.

The award being invalid, the work done under it was unauthorized. The payment by the defendants for a part of the work and construction by them of the culvert is, I think, evidence that they not only permitted but adopted an unauthorized work on the public highway as part of their drainage system—a work which obviously would, and in fact did, cause damage for which they are, in my opinion, liable.

It may be noted that Bailey's requisition was for a drain on his own land, while the award directs the drain to be made wholly upon the highway. How far this affects its validity it is not now necessary to decide.

I also agree with the learned trial Judge that the defendants have no remedy over against the railway company.

Reference may be made to *In re McLellan and Chingua-cousy* (12), *Ward vs. Caledon* (13), *Fitzgerald vs. Ottawa* (14).

I think the appeal should be dismissed.

MacLennan, and Moss, JJ.A., concurred.

Appeal dismissed.

(12) (1900), 27 A. R. 355.

(13) (1892) 19 A. R. 69.

(14) (1895) 22 A. R. 297.

## COURT OF APPEAL, ONTARIO.

IN RE McLELLAN AND TOWNSHIP OF CHINGUACOUSY.

(Reported 27 O. A. R. 355.)

*Ditches and Watercourses Act—Municipal Corporations—Compensation.*

A municipal corporation is an "owner," within the meaning of the Ditches and Watercourses Act in respect of highways under its jurisdiction, and as such may initiate proceedings under that Act. Where it has, pursuant to an award in proceedings initiated by it under that Act, constructed, without negligence, a drain from a highway to a river through an adjoining owner's land, it is not liable to make compensation under the Municipal Act to that adjoining proprietor in case his land has been injuriously affected by the drain.

Judgment of the Official Arbitrator reversed.

Appeal by the township from the award of the Official Arbitrator.

The short point involved was whether the township was liable to make compensation to a landowner through whose land a drain had been made, pursuant to an award in proceedings initiated by the township under the Ditches and Watercourses Act, to carry water from a highway under the township's jurisdiction. The landowner contended that the drain "injuriously affected" his land, and the Official Arbitrator awarded him compensation.

The appeal was argued before MacLennan, Moss, and Lister, J.J.A., on the 21st of March, 1900.

Shepley, Q.C., and A. McKechnie, for the appellants. The respondent is bound by the award under the Ditches and Watercourses Act, and must obtain relief, if at all, under that Act: Seymour vs. Maidstone (1). If the appellants are not protected by the Ditches and Watercourses Act they are trespassers, and the respondent cannot proceed against them

by arbitration. In either view the award appealed against is bad.

T. J. Blain and D. O. Cameron, for the respondents. The respondents were not entitled to proceed under the Ditches and Watercourses Act, and the award under that Act is no protection to them: *Riddell vs. McKay* (2). If they are trespassers the respondent may sue, it is true, but he is not bound to do so. He may, if he wish, treat them as lawfully in possession and proceed by way of arbitration. Even if the proceedings under the Ditches and Watercourses Act are held to be good, there is liability under sec. 437 of the Municipal Act, R. S. O. ch. 223, to make compensation. Here the municipality did not take proceedings as owners of land in the strict sense, but merely as owners in the statutory sense of having jurisdiction over the highway. In such a case they may fairly be held liable to make compensation, though the case might be different if they, like any other owner of land, were taking proceedings under the Ditches and Watercourses Act in respect of land actually owned by them.

Shepley, in reply.

May 15th, 1900. MacLennan, J.A.:—

This is an appeal from an award made by the Official Arbitrator in favour of the plaintiff for \$250 damages to his land, alleged to have been caused by the defendants by the construction of a ditch. The plaintiff had set the arbitrator in motion under the provisions of the Municipal Arbitration Act, R. S. O. ch. 227, and it was objected before him that he had no jurisdiction, inasmuch as the acts of the defendants which were complained of were done under the Ditches and Watercourses Act, and that the defendants were not liable therefor. The Official Arbitrator overruled the objection and proceeded with the arbitration and made the award complained of, holding that the Ditches and Watercourses Act was inapplicable to such a case, and that the plaintiff was entitled to compensation under sec. 437 of the Municipal Act

as for land injuriously affected by the exercise of its powers by the defendant municipality.

It is not disputed that the defendants assumed to act under the Ditches and Watercourses Act, and took the several steps prescribed by that Act, and did what they did in pursuance of the award of the engineer as usual in such cases.

I am quite unable to appreciate the reasons given for holding that the Ditches and Watercourses Act was inapplicable to such a case. It is clear from sec. 3 of this Act that a municipality, in respect of roads within its jurisdiction, is an owner within the Act, and may initiate proceedings under it; and from sec. 7 that it may do so without filing the declaration of ownership required from other owners. If the plaintiff had any objection to the engineer's award he could have appealed against it, but he did not do so, and allowed the work to be done by the defendants. He took the chances of benefit to his land, by the work which the engineer had ordered the defendants to do, and he has himself to blame if the result is injurious, instead of being beneficial to him. I think it too clear for argument, that there can be no claim for compensation, under the Municipal Act, for work done by a municipal corporation in pursuance of an award under the Ditches and Watercourses Act. The appeal, must, therefore, be allowed and the award must be set aside.

Moss, J.A.:—

The claim for compensation in respect of which the award now appealed against was made is thus stated in the respondent's notice: "I claim compensation for damages sustained by me by the work done by the said municipal corporation injuriously affecting my lands. . . . The said work was done by the said corporation upon the award of A. J. Vannostrand, which said award is dated the 4th day of June, 1898."

The award when produced proved to be an award made by Vannostrand acting as an engineer under the provisions of the Ditches and Watercourses Act.

It was admitted before the Official Arbitrator by the respondent's counsel that all the preliminary steps necessary to lead to an award under that Act had been properly taken, that the engineer had his view, and made the award of which the respondent had notice, that the respondent might have taken an appeal to the County Judge as to whether this was a proper award or not, but did not avail himself of the right for certain reasons stated in the notes of the preliminary discussion before the Official Arbitrator.

The proceedings resulting in the award were initiated by the appellants with the object of providing a ditch for drainage of a portion of the allowance for road known as Hurontario Street, within the territorial jurisdiction of the appellants' municipality. The award directed the opening of a ditch from a point on the western limit of the road allowance for a distance of about 188 feet through the respondent's lands to the River Etobicoke, the location, description, and course of the ditch and its points of commencement and termination being fully described in the award and delineated on a plan annexed thereto. It further directed that all the necessary work required to be done for the construction of the ditch should be done by the appellants and at their sole expense, and further that they should maintain it in the future.

The appellants thereafter constructed the ditch in accordance with the directions of the award, and the Official Arbitrator states that he cannot find that it was negligently constructed. The damage for which compensation was claimed and has been awarded has been found to result not from any negligence in the performance of the directions of the award, for they were strictly observed, but from the placing of the ditch where it was placed in relation to the respondent's lands. This the Official Arbitrator says, "necessarily resulted in damage to the claimant's [respondent's] lands by bringing in the water as described, and discharging the same thereon, thereby causing the washing away of the soil and the flooding complained of." That the respondent's lands have suffered some damage from causes probably not fully foreseen by the engineer when making his award, seems apparent.



But it does not follow that the respondent is entitled to compel the appellants to make him compensation for such damage.

The fact that the ditch was constructed under the award and that the award has not been appealed from or set aside presents a formidable obstacle to the respondent's claim.

The Official Arbitrator presents some very strong reasons against the propriety of applying the provisions and machinery of the Ditches and Watercourses Act to the case of a ditch only required to perform the office for which the ditch in question was required.

But if the Ditches and Watercourses Act enables a municipality to invoke its provisions and to initiate proceedings under it in respect of highways under its jurisdiction, then these arguments should have been addressed to the County Judge upon an appeal from the award.

That a municipality is an owner as regards highways under its jurisdiction is declared by sec. 3 of the Act, and that it may commence proceedings seems to follow from the language of sec. 7, that any owner other than the municipality shall before commencing proceedings under the Act file a declaration of ownership.

This being so, and the appellants having taken all the other proper steps to lead to an award, the engineer had jurisdiction to deal with the matter and make an award, and the only remedy of an owner party to the proceedings dissatisfied with the award was an appeal to the County Judge under section 22. That section confers upon the County Judge the amplest powers to set aside, alter, or affirm the award and correct any errors therein. But if the award be not appealed from, or being appealed from is not set aside, it is valid and binding to all intents and purposes: section 24.

The award in question was not appealed from and cannot be disregarded, nor with it standing, and in the face of the whole evidence, can it be assumed that the work of constructing the ditch was done by the appellants in the exercise of its general municipal powers.

The Official Arbitrator suggests that it might be properly assumed that the appellants were proceeding under section 640 of the Municipal Act. But even if the award could be put aside, I do not think section 640 of the Municipal Act would apply to this ditch. Section 554, which the appellants' counsel suggested as probably more applicable, was, until the recent amendment, confined to counties, cities, towns and villages.

On the whole, I think the respondent's remedy must be a reconsideration of the award or some other proceeding under the Ditches and Watercourses Act. He does appear to be suffering some hardship from the actual operation of the ditch, and I think with the Official Arbitrator, that there ought to be a mutual effort to adjust the matter in such wise as to prevent this in the future.

The appeal must be allowed and the award set aside with costs.

Lister, J.A.:—

This is an appeal by the contestants from the award of James Proctor, Esquire, Official Arbitrator, whereby he adjudged and awarded that the appellants should pay to the respondent the sum of \$250 "in full satisfaction of all claims for compensation for entering upon, taking, using and injuriously affecting the said lands of the claimant by reason of the construction of the ditch complained of."

The ditch or drain was constructed by the appellants without negligence in and from a highway under their jurisdiction through and across the lands of the respondent under the authority of an award made by an engineer appointed by them in compliance with section 4 (1) of the Ditches and Watercourses Act, and pursuant to the provisions of that Act, and on their requisition.

The drain was designed to convey the water from the highway situate on the east side of the respondent's lands to the River Etobicoke on the west side thereof.

By the terms of the award the appellants were required at their own cost to construct and maintain the drain. The

respondent having made a claim on the appellants for compensation for damages resulting from the construction of the drain in respect of which they denied all liability, the respondent took proceedings under the arbitration clauses of the Municipal Act for the enforcement of such claim, which resulted in the award now appealed from.

That the appellants are, under the Ditches and Watercourses Act, as regards the highways under their jurisdiction, placed in precisely the same position as an individual owner does not, as it seems to me, admit of serious argument. Section 3 declares that " 'owner' shall mean and include an owner, the executor or executors of an owner . . . and a municipal corporation as regards any highway under its jurisdiction," and section 7 requires that any owner other than the municipality before commencing proceedings under the Act shall file with the clerk of the municipality a declaration of ownership in the form therein prescribed. What the Act does is to confer on a municipal council the same rights and impose the same liabilities as are conferred and imposed on an individual owner. The appellants being an "owner" within the meaning of the Act were clearly within their rights in invoking its provisions in respect of the drain complained of. It is to be observed that while the Act authorizes the construction of a drainage work it imposes no liability for the payment of compensation for damages resulting from the work. Such a claim, therefore, can be neither the subject of an action nor of compensation unless, indeed, some other Act can be applied.

For the respondent it is said that although the work was in fact done under the authority of the Ditches and Watercourses Act, it must nevertheless be regarded as having been done by the appellants in the exercise of their powers within the meaning of section 437 of the Municipal Act, and therefore they are liable for compensation for damages resulting from its execution. I do not think this contention well founded. It appears to me that section 437 clearly contemplates a liability arising from an act which the municipal council upon its own motion could lawfully undertake and

execute, and not to a case where the work causing the damage was done under and in obedience to a valid award made by an engineer pursuant to the provisions of the Ditches and Water-courses Act, the performance of which could, under that Act, be enforced without reference to the wishes of the council.

While it is true the award was made by an engineer appointed by the appellants, it must be borne in mind that the Act requires the municipal council to appoint such an officer and that when appointed, it, and not the council, prescribes his duties. The council have no control over his proceedings and are bound to the same extent as an individual owner to carry out and perform a valid award made by him under its provisions.

Obviously the Act was intended to apply to a small and inexpensive class of drains and not to such drainage works as are contemplated by the Municipal Drainage Act.

It, as before remarked, creates no liability for compensation or damages for lands entered upon, taken, used for, or resulting from, a work authorized by a valid award made under its provisions. The rights and liabilities of the parties to such an award for or in respect of anything lawfully done under it, must be enforced and worked out under the provisions of the Act.

I entirely agree with the observations of the late Mr. Justice John Wilson, in *Murray v. Dawson* (3), which arose upon the construction of certain provisions of the Fence-viewers Act—an Act which related to not only line fences but to ditches such as are authorized by the Act under consideration—where he is reported to have said: “To hold otherwise would, we think, open an appalling source of litigation and be opposed to the spirit and intention of the Legislature.”

In the view I take of the present case, the authorities cited as bearing upon the construction of various sections of the Municipal Act are not in point. I think the appeal ought to be allowed with costs.

*Appeal allowed.*



## CHAPTER 226

*Revised Statutes of Ontario (1897) as amended up to and including the year 1902.*

### An Act respecting the Construction of Drains.

- SHORT TITLE, s. 1.  
INTERPRETATION, s. 2.  
DESCRIPTION OF WORKS WHICH MAY BE CONSTRUCTED, s. 3.  
PROCEEDINGS:  
  Petition, s. 4.  
  Estimate and assessment by Engineer or Surveyor, ss. 5-10.  
  Report on covering drains, s. 11.  
  Distinguishing assessments, ss. 12-14.  
  Filing report, s. 15.  
  Notice to persons assessed, s. 16.  
  Consideration of report by Council, s. 17.  
  Withdrawal of petitioners, s. 18.  
  By-laws, ss. 19-20.  
  Publication of by-laws, ss. 21, 22.  
  Motion to quash, limitation of time for, s. 23.  
COURT OF REVISION, ss. 24-40.  
APPEALS, ss. 41-52.  
DEBENTURES, ss. 53-56.  
ASSESSMENT OF ADJOINING MUNICIPALITIES, ss. 57-60.  
SETTLING ASSESSMENTS BETWEEN MUNICIPALITIES, ss. 61-64.  
ASSESSMENT FOR BENEFIT OF CUTTING OFF FLOW OF SURFACE WATER, s. 65.  
AMENDING BY-LAWS, ss. 66-67.  
MAINTENANCE OF DRAINAGE WORKS, ss. 68-71.  
VARYING ASSESSMENTS FOR MAINTENANCE, ss. 72-73.  
REPAIRS AND ALTERATIONS:  
  Alterations of work without further report, s. 74.  
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  Duty of owners as to cleaning out and keeping banks in order, s. 77 (a).  
  MINOR REPAIRS, s. 78.  
  PENALTIES FOR INJURING WORKS, s. 79.  
  REMOVAL OF ARTIFICIAL OBSTRUCTIONS IN CONSTRUCTING WORKS, s. 80.  
  OPERATING PUMPING WORKS, ss. 81, 82.  
  DEBENTURES FOR MAINTENANCE, s. 83.  
  MUNICIPALITIES ADOPTING DRAINS UNDER DITCHES AND WATERCOURSES ACT, s. 84.  
  WORK ON RAILWAY LANDS, s. 85.  
  COSTS OF DRAINAGE WORK, WHAT TO INCLUDE, s. 86.  
  PAYMENT OF ASSESSMENT AS BETWEEN LANDLORD AND TENANT, s. 87.  
  DRAINAGE TRIALS:  
    Referee, Appointment of, s. 88.  
    Powers of Referee, ss. 89, 90.  
    Appeals from Assessment, ss. 91, 92.  
    Applications, &c., affecting Drainage Works, to be made before Referee, s. 93.  
    Decision of Court of Appeal final, s. 94.  
    Mode of assessing damage payable by municipalities, s. 95.  
    Procedure before Referee, ss. 96-109.  
    Appeals from Referee, s. 110.  
  RULES AND TARIFF OF COSTS, ss. 111-113.  
  REPEALING CLAUSE, s. 114.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title.      1. This Act may be cited as “*The Municipal Drainage Act*, 57 V. c. 56, s. 1.”

#### INTERPRETATION.

Interpretation      2. Where the words following occur in this Act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:—

“Construction.”      (1) “Construction” shall mean the original opening, making, excavating or completing of drainage work;

“County Judge.”      (2) “County Judge” and “Judge” shall mean the senior, junior, or acting Judge of a County Court to whom appeals lie under the provisions of this Act from a Court of Revision, but shall not include a deputy Judge;

“Court of Revision.”      (3) “Court of Revision” shall mean a Court of Revision constituted under the provisions of this Act, for the trial of complaints respecting assessments for drainage work;

“Initiating Municipality.”      (4) “Initiating Municipality” shall mean the municipality undertaking the construction of any drainage work to which this Act applies;

“Maintenance.”      (5) “Maintenance” shall mean the preservation and keeping in repair of a drainage work;

Fewster vs. Raleigh, 1 C. & S. 227.

Peltier vs. Dover, 1 C. & S. 323.

“Municipality.”      (6) “Municipality” shall not include a county municipality;

“Owner,”  
“actual owner.”      (7) “Owner” or “actual owner” shall include the executor or administrator of an owner’s estate, the guardian of an infant owner, any person entitled to sell and convey the land, an agent of an owner under a general power of attorney, or under a power of attorney empowering him to deal with

lands, and a municipal corporation as regards highways under their jurisdiction.

(8) "Referee" shall mean the referee appointed under the provisions of *The Drainage Trials Act, 1891*, or of this Act, for the trial of disputes under the drainage laws of the Province of Ontario; <sup>"Referee."</sup> <sup>54 V. c. 51.</sup>

(9) "Reference" shall mean a reference or transfer to the said referee under the provisions of this Act; <sup>"Reference."</sup>

(10) "Relief" shall mean relieving from liability for causing water to flow upon and injure lands or roads; <sup>"Relief."</sup>

(11) "Sufficient outlet" shall mean the safe discharge of water at a point where it will do no injury to lands or roads. <sup>"Sufficient outlet."</sup> 57 V. c. 56, s. 2.

#### CONSTRUCTION OF DRAINAGE WORKS.

3.—(1) Upon the petition (a) of the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners) as shown by the last revised assessment roll to be the owners of the lands to be benefited in any described area within any township, incorporated village, town or city, to the municipal council thereof, for the draining of the area described in the petition by means of drainage work, that is to say, the construction of a drain or drains, the deepening, straightening, widening, clearing of obstructions, or otherwise improving of any stream, creek or watercourse, (b) the lowering of the waters of any lake or pond, or by any or all of said means as may be set forth in the petition, the council may procure an engineer or Ontario Land Surveyor (c) to <sup>What work may be undertaken on petition.</sup>

(a) *Hiles vs. Ellice*, 1 C. & S. 65; *Coulter vs. Elma*, 1 C. & S. 204; *Malahide vs. Dereham*, 1 C. & S. 243; *Plympton vs. Sarnia*, 2 C. & S. 223; *Warwick vs. Brooke*, 2 C. & S. 243; *Lovett vs. Colchester North*, 2 C. & S. 306; *Challoner vs. Lobo*, 2 C. & S. 336, 344.

(b) *Fewster vs. Raleigh*, 1 C. & S. 227.

(c) *Sage vs. West Oxford* and *Thornton vs. West Oxford*, 1 C. & S. 122; *Mornington vs. Ellice*, 1 C. & S. 257; *Tilbury East vs. Romney*, and *Tilbury North vs. Romney*, 1 C. & S. 261; *South Dorchester and Dereham vs. Malahide*, 1 C. & S. 275; *Camden vs. Dresden*, 2 C. & S. 308.



Council to  
order  
examination  
and report by  
engineer.

make an examination of the area to be drained, the stream, creek or watercourse to be deepened, straightened, widened, cleared of obstructions or otherwise improved, or the lake or pond, the waters of which are to be lowered, according to the prayer of the petition, and to prepare a report, plans, specifications and estimates of the drainage work (d) and to make an assessment of the lands and roads within said area to be benefited and of any other lands and roads liable to be assessed as hereinafter provided, stating as nearly as may be, in his opinion, the proportion of the cost of the work to be paid by every road and lot or portion of lot for benefit, and for outlet liability and relief from injuring liability as hereinafter defined. (e)

(d) *McCulloch vs. Caledonia*, 2 C. & S. 1.

(e) *Harwich vs. Raleigh*, and *Tilbury East vs. Raleigh*. 1 C. & S. 55; *Romney vs. Tilbury North*, 1 C. & S. 113; *Gosfield South vs. Mersea*, 1 C. & S. 268; *Caradoc vs. Ekfrid*, 1 C. & S. 295; *Gosfield South vs. Gosfield North*, 1 C. & S. 342.

When work  
requires  
pumping,  
embanking  
etc.

(2) The provisions of this Act shall apply and extend to every case where the drainage work can only be effectually executed by embanking, pumping or other mechanical operations, but in every such case the municipal council shall not proceed except upon the petition of at least two-thirds of the owners of lands within the area described according to the preceding sub-section.

*Sutherland vs. Romney*, 2 C. & S. 85.

When lands  
may be  
assessed by  
engineer for  
"injuring  
liability."

(3) If from the lands or roads of any municipality, company or individual, water is by any means caused to flow upon and injure the lands or roads of any other municipality, company or individual, the lands and roads from which the water is so caused to flow may, under all the formalities and powers contained herein, except the petition, be assessed and charged for the construction and maintenance of the drainage work required for relieving the injured lands or roads from such water, and to the extent of the cost of the work necessary for their relief, as may be determined by the engineer or sur-

veyor, Court of Revision, County Judge, or referee; and such assessment may be termed "injuring liability."

(a) The owners of the lands and roads thus made liable for assessment shall neither count for nor against the petition required by sub-section 1 of this section, unless within the area therein described.

*Tilbury E. vs. Romney*, 1 C. & S. 261; *Gosfield S. vs. Mersea*, 1 C. & S. 268; *Oxford vs. Howard*, 2 C. & S. 163; *Warwick vs. Brooke*, 2 C. & S. 244; *Wallace vs. Elma*, 2 C. & S. 295.

(4) The lands and roads of any municipality, company or individual using any drainage work as an outlet, or for which when the work is constructed, an improved outlet is thereby provided, either directly or through the medium of any other drainage work or of a swale, ravine, creek or watercourse (a) may, under all the formalities and powers contained herein, except the petition, be assessed and charged for the construction and maintenance of the drainage work so used as an outlet or an improved outlet, and to the extent of the cost of the work necessary for any such outlet, as may be determined by the engineer or surveyor, Court of Revision, County Judge or referee; and such assessment may be termed "outlet liability" (b).

When lands may be assessed for "outlet liability."

(a) The owners of the lands and roads thus made liable to assessment shall neither count for nor against the petition required by sub-section 1 of this section, unless within the area therein described.

(a) *Desmonde vs. Armstrong*, 1 C. & S. 221.

(b) *Harwich vs. Raleigh*, No. 2, 1 C. & S. 147, 157; *Broughton vs. Grey*, 1 C. & S. 169; *South Dorchester vs. Malahide*, 1 C. & S. 275; *Caradoc vs. Ekfrid*, 1 C. & S. 295.

(5) The assessment for injuring liability and outlet liability provided for in the two next preceding sub-sections shall be based upon the volume, and shall also have regard to the speed, of the water artificially caused to flow upon the injured lands or into the drainage work from the lands and roads liable for such assessments. 57 V. c. 56, s. 3.

Basis of assessment for outlet and injuring liability.

*Caradoc vs. Ekfrid*, 1 C. & S. 295; *Mersea vs. Rochester*, 2 C. & S. 60; *Sutherland vs. Romney*, 2 C. & S. 96.

## PETITION FOR CONSTRUCTION.

Form of  
petition.

4. The petition shall be in the form or to the effect of Schedule "A" to this Act. 57 V. c. 56, s. 4, part.

## DUTIES OF ENGINEER OR SURVEYOR.

Oath of engi-  
neer or  
surveyor.

5. Any engineer or surveyor employed or appointed by any municipal council to perform any work under the provisions of this Act, including the assessment of real property for the purpose of drainage work, shall before entering upon his duty, take and subscribe the following oath (or affirmation) before the clerk of the municipality, a justice of the peace or a commissioner for taking affidavits, and shall leave the same with, or send it by registered letter to the clerk of the municipality.

In the matter of the proposed drainage work (*or as the case may be*) in the township of (*name*).

I (*name in full*) of the town of \_\_\_\_\_ in the county of \_\_\_\_\_, Engineer (*or* Surveyor) make oath and say, (*or* do solemnly declare and affirm) :

That I will, to the best of my skill, knowledge, judgment and ability, honestly and faithfully and without fear of, favour to, or prejudice against any owner or owners, or other person or persons whomsoever, perform the duty assigned to me in connection with the above work and will make a true report thereon.

Sworn (*or* solemnly declared and affirmed)  
before me at the \_\_\_\_\_ of \_\_\_\_\_  
in the county of \_\_\_\_\_ this \_\_\_\_\_  
day of \_\_\_\_\_ A.D. 189 \_\_\_\_\_ }

A Commissioner, etc. (*or* Township Clerk, *or* J.P.)

57 V. c. 56, s. 5.

Colchester North vs. Gosfield North, 2 C. & S. 206.

Assessment of  
whole lot or  
sub-division.

6. The engineer or surveyor, in assessing the lands to be benefited or otherwise liable for assessment under this Act, need not confine his assessment to the part of the lot actually affected, but may place such assessment on the quarter, half or whole lot containing the part affected as the case may be.

if the owner of such part is also the owner of such lot or other said sub-division. 57 V. c. 56, s. 6.

Gosfield S. vs. Mersea, 1 C. & S. 268; South Dorchester vs. Malahide, 1 C. & S. 275; Gosfield S. vs. Gosfield N., 1 C. & S. 342; Warwick vs. Brooke, 2 C. & S. 243; Byrne vs. North Dorchester, 2 C. & S. 318.

6.—(a) Where part of a whole lot or of a sub-division or portion of a lot assessed by the engineer has been sold since the final revision of the assessment, the owner of the part so sold and the owner of the remaining portion of the lot or sub-division or portion of a lot so assessed or either of them may give notice to the clerk of the municipality that he requires the said assessment to be apportioned between the owners of the property so assessed and sub-divided, and the township engineer shall thereupon make such apportionment in writing, and the same shall be filed with the clerk and shall be by him attached to the original assessment, and shall be binding on the lands assessed in the manner apportioned by the said engineer, and the rate shall thereafter be levied and collected accordingly. The costs of the engineer shall be borne and paid by the parties in the manner which may be fixed or apportioned by such engineer. 62 V. (2) c. 28, s. 4.

Apportionment of assessment for drainage work on sub-division of land assessed.

7. The assessment upon any lands or roads for any drainage work may be shown by the engineer or surveyor placing sums of money opposite the lands or roads, and it shall not be necessary to insert the fractional part of the whole cost to be borne by the lands or roads. 57 V. c. 56, s. 7.

Assessment may be shown in money.

8. The engineer or surveyor, when required by the council, shall make plans, specifications and detailed estimates of the drainage work to be constructed and charge the same to the work as part of its cost. 57 V. c. 56, s. 8.

Plans, specifications and estimates.

8.—(a) Where, in the opinion of the engineer or surveyor, the cost of continuing the drainage work to a point where the discharge of water will do no injury to lands and roads, will exceed the amount of injury likely to be caused to low lying lands below the termination of the work, he may

Assessment of compensation for damage to low lands instead of constructing drain to an outlet.

instead of continuing the work to such a point, include in his estimate of the cost of the drainage work a sufficient sum to compensate the owners of such low lying lands for any injuries they may sustain from the drainage work, and he shall in his report determine the amount to be paid to the respective owners of such low lying lands in respect of such injuries. 2 Edw. VII. c. 32, s. 1.

Bridges and  
culverts on  
highways.

9.—(1) The engineer or surveyor shall in his report and estimates provide for the construction, enlargement or other improvement of any bridges or culverts throughout the course of the drainage work rendered necessary by such work crossing any public highway or the travelled portion thereof; and he shall in his assessment apportion the cost of bridges and culverts between the drainage work and the municipality or municipalities having jurisdiction over such public highway as to him may seem just.

Camden vs. Dresden, 2 C. & S. 308.

Bridges be-  
tween high-  
ways and  
private lands.

(2) The engineer or surveyor shall also in his report and estimates provide for the construction or enlargement of bridges required to afford access from the lands of owners to the travelled portion of any public highway, and he shall include the cost of the construction or enlargement of such bridges in his assessment for the construction of the drainage work, and they shall, for the purposes of construction and maintenance, be deemed part of the drainage work.

Fairbairn vs. Sandwich South, 2 C. & S. 133.

Farm bridges.

(3) The engineer or surveyor shall in the same manner provide for the construction or enlargement of bridges rendered necessary by the drainage work upon the lands of any owner, and shall fix the value of the construction or enlargement thereof to be paid to the respective owners entitled thereto, but the land assessed for the drainage work shall not nor shall any municipal corporation be liable for keeping such bridges in repair.

Allowing for  
private  
ditches, etc.

(4) The engineer or surveyor shall likewise in his report estimate and allow in money to any person, company or corporation the value to the drainage work of any private ditch

or drain or of any ditch constructed under any Act respecting ditches or watercourses which may be incorporated in whole or in part into such drainage work or used therewith.

*Euphemia vs. Brooke*, 1 C. & S. 358.

(5) The engineer or surveyor shall further in his report determine in what manner the material taken from any drainage work, either in the construction or repair thereof, shall be disposed of, and the amount to be paid to the respective persons entitled for damages to lands and crops (if any) occasioned thereby, and shall include such sums in his estimates of the cost of the drainage work or the repairs.

*Wilkie vs. Dutton*, 1 C. & S. 132.

(6) Any owner of lands affected by the drainage work, if dissatisfied with the report of the engineer in respect of any of the provisions of this section, may appeal therefrom to the referee, and in every such case the notice of appeal shall be served upon the head of the council of the initiating municipality and the clerk thereof within 10 days after the adoption of the engineer's report by the council, and the further proceedings on such appeal shall be as hereinafter provided in other cases of appeals to the referee. The referee, on an appeal under this sub-section, may make such order as to him seems just, and his decision shall be final.

57 V. c. 56, s. 9. 2 Edw. VII. c. 32, s. 2.

*Thackery vs. Raleigh*, 1 C. & S. 328.

(7) Forthwith upon the filing of the engineer's report with the clerk of the municipality, the clerk shall, by letter or postal card, notify the parties assessed of such assessment and the amount thereof. In case more than one municipality is interested in the proposed work, the clerk of such other municipality or municipalities shall forthwith, upon the filing of a copy of the engineer's report in their office, notify the parties assessed of such assessment and the amount thereof; and he shall also in like manner notify each of the owners of lands in respect of which the report provides for compensation of the date of filing the report, the amount awarded

Notice to owners for whom compensation assessed.

to such owner for compensation and the date of the council meeting at which the report will be read and considered. 62 V. (2) c. 28, s. 5. 2 Edw. VII. c. 32, s. 3.

Time for filing report of engineer.

(8) The report of the engineer shall be filed within six months after the filing of the petition; provided that upon the application of the engineer the time for filing the report may be extended from time to time for additional periods of six months, when the council is satisfied that owing to the nature of the work it was impracticable for the report of the engineer to be completed within the time limited by law.

If engineer neglects to do work Council may appoint another.

(9) In case the engineer neglects to make his report within the time limited by the preceding sub-section, or within the time fixed by the council under the said sub-section, he shall forfeit all claim for compensation for the work done by him upon the drain, and the council may employ some other engineer to make the examination, report and assessment required by the preceding section. 62 V. (2) c. 28, s. 6.

Spreading earth and removing timber on road allowances.

10. When a drainage work is to be constructed on or along a road allowance the engineer or surveyor shall, upon the application of the municipal council controlling such road allowance, place in his estimate of the cost of the work a sum sufficient to close-chop, or grub and clear not less than twelve feet of the middle of the road allowance (if required) and to spread thereon the earth to be taken from the work and shall charge the cost thereof to the municipality, together with its proportion of the cost of the drainage work. 57 V. c. 56, s. 10.

Engineer to apportion work of cleaning out drain among owners.

(10a) Such by-law may further provide that the engineer or surveyor shall in his report state the portion of the said drain already or thereafter to be constructed which shall be by each owner assessed for benefit, cleaned out and kept clear and free from obstructions and in good order as prescribed by the above section 77a of this Act. 63 V. c. 38, s. 2 (2).

## COVERING DRAINAGE WORK.

11. Where the engineer or surveyor reports in favour of covering the whole or any part of a drainage work constructed under this Act, he shall determine and state in his report the size and capacity thereof and also the material to be used in its construction, and all the provisions of this Act shall apply thereto in the same manner and to the same extent as to an uncovered or open drainage work, but in no case shall the improvement of a creek, stream or natural watercourse be made into a covered drainage work unless it provides capacity for all the surface water from lands and roads draining naturally towards and into it, as well as for all the waters from all the lands assessed for the drainage work. 57 V. c. 56, s. 11.

## DISTINGUISHING ASSESSMENTS.

12. The engineer or surveyor shall, in his report, assess for benefit, outlet liability and injuring liability, and shall also, in his assessment schedule, insert the sum charged for each, opposite the lands and roads liable therefor respectively, and in separate columns. 57 V. c. 56, s. 12.

Harwich vs. Raleigh, 1 C. & S. 55; Romney vs. Tilbury N., 1 C. & S. 113.

13. In fixing the sum to be assessed upon any lands or roads, the engineer or surveyor may take into consideration any prior assessment on the same lands or roads for drainage work and repairs and make such allowance or deduction therefor as may seem just, and he shall in his report state the allowance made by him in respect thereof. 57 V. c. 56, s. 13.

South Dorchester vs. Malahide, 1 C. & S. 275.

14. The engineer or surveyor aforesaid shall determine and report to the council of the municipality by which he was employed, whether the drainage work shall be constructed and maintained solely at the expense of such municipality and the lands assessed therein, or at the expense of all the municipalities interested, and the lands therein assessed, and in what proportions. 57 V. c. 56, s. 14.

Caradoc vs. Ekfrid, 1 C. & S. 295.



## FILING REPORT.

Engineer to  
file report.

15. As soon as the engineer or surveyor has completed his report, plans, specifications, assessments and estimates, he shall file the same with the clerk of the municipality by which he was employed. 57 V. c. 56, s. 15.

## NOTICE TO PERSONS ASSESSED.

Clerk to notify  
parties  
assessed.

16. The clerk of the municipality shall notify all parties assessed within the area described in the petition, by mailing to the owner of every parcel of land assessed therein for the drainage work, a circular or postal card upon which shall be stated the date of filing the report, the name or other general designation of the drainage work, its estimated cost, the owner's lands and their assessment, distinguishing benefit, outlet liability and injuring liability, and the date of the council meeting at which the report will be read and considered, which shall be not less than ten days after the mailing of the last of such circulars or postal cards, and the determination of the council as to the sufficiency of notice or otherwise shall be final and conclusive. 57 V. c. 56, s. 16.

## CONSIDERATION OF REPORT.

Proceedings  
at meeting for  
consideration  
of report.

17. The municipal council shall at the meeting mentioned in such notice, immediately after dealing with the minutes of its previous meeting, cause the report to be read by the clerk to all the ratepayers in attendance, and shall give an opportunity to any person who has signed the petition to withdraw from it by putting his withdrawal in writing, signing the same and filing it with the clerk, and shall also give those present who have not signed the petition an opportunity so to do, and should any of the roads of the municipality be assessed, the council may by resolution authorize the head or acting head of the municipality to sign the petition for the municipality, and such signature shall count as that of one person benefited in favour of the petition. 57 V. c. 56, s. 17.

## EFFECT OF WITHDRAWAL FROM PETITION.

18. Should the petition at the close of the said meeting of the council contain the names of the majority of the persons shown as aforesaid to be owners benefited within the area described, the council may proceed to adopt the report (a) and pass a by-law authorizing the work, and no person having signed the petition shall after the adoption of the report be permitted to withdraw; but if after striking out the names of the persons withdrawing, the names remaining, including the names, if any, added as provided by section 17 of this Act, do not represent a sufficient number of owners within the area described to comply with the provisions of section 3 of this Act, then the persons who have withdrawn from the petition shall on their respective assessments in the report with one hundred per centum added thereto, together with the other original petitioners on their respective assessments in the report, be *pro rata*, chargeable with and liable to the municipality for the expenses incurred by said municipality in connection with such petition and report, and the sum with which each of such owners is chargeable shall be entered upon the collector's roll for such municipality against the lands of the person liable, and shall be collected in the same manner as taxes placed on the roll for collection. 57 V. c. 56, s. 18.

(a) S. *Dorchester vs. Malahide*, 1 C. & S. 275.

## BY-LAWS.

19. Should the council of the municipality in which the lands and roads described in the petition lie, be of the opinion that the drainage work proposed in said petition, or a portion thereof, would be desirable, the council may pass a by-law or by-laws:—

*Doing Work and Borrowing Money.*

1. For providing for the proposed drainage work or a portion thereof being done as the case may be. What by-laws may be passed by council.

2. For borrowing on the credit of the municipality the funds necessary for the work, or the portion to be contributed Providing for work.

by the initiating municipality when the same is to be constructed at the expense of two or more municipalities, and for issuing the debentures of the municipality to the requisite amount, including the costs of appeal, if any, and any amount payable in respect of work on railway lands, in sums of not less than \$50 each, and payable within twenty years from date (except in case of pumping and embanking drainage work, the debentures for which shall be payable within thirty years from their date) with interest at a rate of not less than 4 per centum per annum.

### *Assessing Lands and Roads.*

Assessing  
lands and  
roads.

3. For assessing and levying in the same manner as taxes are levied upon the lands and roads (including roads held by joint stock companies, railway companies, private individuals, counties or county councils) to be benefited by the work and otherwise liable for assessment under this Act in the municipality passing the by-law, a special rate sufficient for the payment of the principal and interest of the debentures, and for so assessing, levying and collecting the same as other taxes are assessed, levied and collected, in proportion as nearly as may be to their respective liability to contribute.

Fixing time  
for paying  
assessment.

4. For regulating the times and manner in which the assessments shall be paid.

### *Determining Assessment Liability.*

Determining  
property to be  
benefited.

5. For determining what lands and roads will be benefited by or otherwise rendered liable for assessment for the drainage work, and the proportion in which the assessment should be made, subject in every case of complaint by the owner or any person interested in any lands or roads to appeal as hereinafter provided. 57 V. c. 56, s. 19.

### *FORM OF BY-LAW.*

Form of  
by-law.

20. The by-law shall, varying with the circumstances, be in the form or to the effect of the form given in Schedule B to this Act. 57 V. c. 56, s. 20.

PUBLICATION OF BY-LAW.

21.—(1) Before the final passing of the by-law, it shall be published once in every week for four consecutive weeks, in such newspaper published either within the municipality or in the county town, or in a newspaper published in an adjoining or neighbouring municipality, as the council may by resolution designate, with a notice of the time and place of holding the Court of Revision, and also a notice that anyone intending to apply to have the by-law or any part thereof quashed, must, not later than ten days after the final passing thereof, serve a notice in writing upon the reeve or other head officer and the clerk of the municipality, of his intention to make application for that purpose to the High Court of Justice during the six weeks next ensuing the final passing of the by-law.

Publication of by-law and notice of sitting of court of revision.

(2) The clerk shall furnish the publisher of the newspaper with the names and post office addresses of all persons within the municipality whose lands are assessed for the drainage work, and the publisher shall mail or cause to be mailed to each owner, to such post office address, the first two issues of the newspaper containing the by-law, and the publisher or person mailing such newspapers shall make a statutory declaration of such mailing, and file the same with the clerk of the municipality publishing the by-law. 57 V. c. 56, s. 21.

Newspaper to be sent to each person assessed.

22. The municipal council may, at its option, instead of publishing in a newspaper, by resolution direct that a copy of the by-law, including said notice of the sitting of the court of revision and notice as to proceedings to quash, written or printed, or partly written and partly printed, be served upon each of the assessed owners, or their lessees or the occupant of their lands, or the agent of such owner, or be left on the lands if occupied with some grown up person, and if the lands are unoccupied and the owner or his agent does not reside within the municipality, the council may cause a copy of the by-law and notices to be sent by registered letter to the last

Service in lieu of publication.

known address of such owner, and a statutory declaration shall be made by the person effecting any service or mailing any such registered letter, showing the manner and date of effecting the service, or mailing the registered letter, and the said declaration shall be filed by the person making the same with the clerk of the municipality passing the by-law. 57 V. c. 56, s. 22.

If by-law or part thereof not quashed within time limited.

**23.** In case no notice of the intention to make application to quash a by-law is served within the time limited for that purpose in the notice attached to the by-law, or where the notice is served, then if the application is not made or is made unsuccessfully in whole or in part, the by-law, or so much thereof as is not quashed, so far as the same ordains, prescribes or directs anything within the proper competence of the council to ordain, prescribe or direct, shall, notwithstanding any want of form or substance, either in the by-law itself or in the time or manner of passing the same, be a valid by-law. 57 V. c. 56, s. 23.

Byrne vs. North Dorchester, 2 C. & S. 318.

#### COURT OF REVISION.

Court of revision where council consists of five or less than five.

**24.** If the council of the municipality consists of not more than five members, such five members shall be a court for the revision of the assessments for the drainage work. 57 V. c. 56, s. 24.

Where council contains more than five members.

**25.** If the council consists of more than five members, it shall appoint five of its members to constitute the court of revision. 57 V. c. 56, s. 25.

Oath of member of court.

**26.** Every member of the court of revision shall, before entering upon his duties, take and subscribe before the clerk of the municipality the following oath, or affirmation in cases where by-law affirmation is allowed:

I, \_\_\_\_\_, do solemnly swear (*or affirm*), that I will, to the best of my judgment and ability, and without fear, favour or partiality, honestly decide the appeals to the court of revision, from the assessments appearing in a by-law (*here*

*set out title of by-law*), which may be brought before me for trial as a member of said court. 57 V. c. 56, s. 26.

27. Three members of the court of revision shall constitute a quorum, and the majority of a quorum may decide all questions before the court. But no member of the court shall act as a member thereof while any appeal is being heard respecting any lands in which he is directly or indirectly interested, save and except roads and lands under the jurisdiction of the municipal council. *See* 57 V. c. 56, s. 27.

Members not to sit on appeals when interested.

28.—(1) The clerk of the municipality shall be the clerk of the court, and shall record the proceedings thereof and shall issue summonses to witnesses to attend any sittings of the court.

Clerk of court.

(2) The summons to any witness issued by the clerk under this section may be in the following form:—

Form of summons.

You are hereby required to attend and give evidence before the court of revision at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_, in the matter of the drainage work (*naming or describing work*) and of the following appeal.

Appellant (*name of*)

A. B.

Clerk of the township of

(3) The fees payable to any witness on an appeal to the court of revision shall be according to the scale of witness fees in the division court. 57 V. c. 56, s. 28.

Witness fees.

29. At the time appointed, the court shall meet and try all complaints in regard to owners wrongly assessed or omitted from assessment, or assessed at too high or too low an amount, and the court may adjourn from time to time as required. 57 V. c. 56, s. 29.

Meeting and adjournments.

30. The evidence of witnesses shall be taken on oath and any member of the court may administer an oath to any party or witness. 57 V. c. 56, s. 30.

Administering oaths and summoning witnesses.

Witness  
failing to  
attend when  
summoned.

**31.** If any person summoned to attend the court of revision as a witness fails, without good and sufficient reason, to attend (having been tendered the proper witness fees) he shall incur a penalty of \$20 to be recovered with costs, by and to the use of any person suing for the same, either by suit in the proper division court, or in any way in which penalties incurred under any by-law of the municipality may be recovered. 57 V. c. 56, s. 31.

*Procedure for Trial of Complaints.*

Who may give  
notice of  
appeal.

**32.** Any owner of land, or, where roads in the municipality are assessed, any ratepayer, complaining of overcharge in the assessment of his own land, or of any roads of the municipality, or of the undercharge of any other lands, or of any road in the municipality, or that lands or roads within the area described in the petition which should have been assessed for benefit, have been wrongly omitted from the assessment, or that lands or roads which should have been assessed for outlet liability or injuring liability have been wrongly omitted, may personally, or by his agent, give notice in writing to the clerk of the municipality, that he considers himself aggrieved for any or all of the causes aforesaid. 57 V. c. 56, s. 32.

Time for holding  
court of  
revision.

**33.** The trial of complaints shall be had in the first instance by and before the court of revision of the municipality in which the lands and roads assessed are situate, and the first sitting of such court shall be held pursuant to notice on some day not earlier than twenty nor later than thirty days from the day on which the by-law was first published, or from the date of completing the services or mailing of a printed copy of the by-law, as the case may be; notice of the first sitting of the court shall be published or served with by-law, but the court may adjourn from time to time as occasion may require; and all notices of appeal shall be served on the clerk of the municipality at least ten days prior to the first sitting of the court; but the court may, though such notice of appeal be not given, by resolution passed at its first sitting,

Notice.

allow an appeal to be heard on such conditions as to giving notice to all persons interested or otherwise as may be just.  
57 V. c. 56, s. 33.

**34.** If any complaint is made on the ground that any lands or roads have been assessed too low or wrongly omitted from assessment by the engineer or surveyor, the clerk shall give notice of the complaint and the time of the trial to the owner or person interested in such lands, or in the case of roads, to the reeve or other head of the municipality; which notice shall be in the form following or to the like effect:

Take notice that you are required to attend before the court of revision at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_, in the matter of the following appeal:—

“ Appellant, (name of)

Subject.—That you are assessed too low (*or as the case may be*) for drainage work (*naming the drainage work*).

"To *J. K.*

(Signed) X. Y.  
Clerk."

57 V. c. 56, s. 34.

**35.** The notice in the preceding section mentioned shall be sent by letter addressed to such person and to his post office address or to his last known address, at least seven days before the first sitting of the court for the trial of complaints. 57 V. c. 56, s. 35.

**36.** The clerk of the court shall enter the appeals on a list in the order in which they are received by him, and the court shall proceed with the appeals in the order, as nearly as may be, in which they are so entered, but may grant an adjournment or postponement of any appeal. 57 V. c. 56, s. 36.

**37. Such list may be in the following form:—**

Appeals from the assessment of the engineer on drainage work, to be heard at the court of revision, to be

C. & S. D.—36

Form, of list.  
of appeals.



## CONSTRUCTION OF DRAINS.

held at                      commencing at 10 o'clock in the forenoon on  
the                              day of                                      , 189 .

Appellant. Omitted or wrongly assessed.      Matter complained of.

|           |           |                           |
|-----------|-----------|---------------------------|
| A. B..... | Self..... | Overcharged for benefit.  |
| C. D..... | Self..... | Overcharged for outlet.   |
| E. F..... | Self..... | Overcharged for injuring. |
| G. H..... | J. R..... | Undercharge for benefit.  |
| L. M..... | N. O..... | Undercharge for outlet.   |
| P. Q..... | R. S..... | Undercharge injuring.     |
| T. U..... | V. W..... | Wrongly omitted.          |
| X. Y..... | Self..... | Wrongly assessed.         |
| etc.      | etc.      | etc.                      |

57 V. c. 56, s.37.

Court of revision may take into consideration prior assessments.

**38.** In case any lands or roads have been assessed for the construction or repair of a drainage work, and the same property is afterwards assessed by the engineer or surveyor for the construction or repair of any other drainage work, the court of revision or judge may take into consideration any prior assessment for drainage work on the same property and give such effect thereto as may be just. 57 V. c. 56, s. 38.

S. *Dorchester vs. Malahide*, 1 C. & S. 275.

Adjournment of court to notify persons affected by alteration of assessment.

**39.** When the ground of complaint is, that lands or roads are assessed too high, and the evidence adduced satisfies the court of revision or judge that the assessments on such lands or roads should be reduced, but no evidence is given of other lands or roads assessed too low or omitted, the court or judge shall adjourn the hearing of such appeal, for a time sufficient to enable the clerk to notify by postal card or letter all persons affected of the date to which such hearing is adjourned; the clerk shall so notify all persons interested and unless they appear and show cause against the reduction of the assessment appealed against or the increase of their own, the court or judge may dispose of the matter of appeal in such manner as may be just, and the sum by which the assessment appealed against is reduced (if any) may be distributed *pro rata* over the assessments of its own class or otherwise so as to do justice to all parties. 57 V. c. 56, s. 39.

40. The clerk shall by registered letter immediately after the close of the court, notify all appellants of the result of their appeals and also of the date of the closing of the court of revision. 57 V. c. 56 s. 40.

APPEALS FROM COURT OF REVISION.

41. An appeal from the court of revision shall lie to the county judge of the county within which the municipality is situate, and not only against a decision of the court of revision, but also against the omission, neglect or refusal of said court to hear or decide an appeal. 57 V. c. 56, s. 41.

42. The person appealing shall, in person or by solicitor or agent, file with the clerk of the municipality within ten days after the date of the closing of the court of revision, a written notice of his intention to appeal to the judge. 57 V. c. 56, s. 42.

43. The clerk shall immediately after the time limited for filing appeals, forward a list of the same to the judge, who shall then notify the clerk of the day he appoints for the hearing thereof, and shall fix the place for holding such hearing at the town hall or other place of meeting of the council of the municipality from the court of revision of which the appeal is made, unless the judge for the greater convenience of the parties and to save expense fixes some other place for the hearing. 57 V. c. 56, s. 43.

44. The clerk shall thereupon give notice to all the parties appealed against, in the same manner as is provided for giving notice on a complaint to the court of revision, but in the event of failure by the clerk to give the required notice, or to have the same given within proper time, the judge may direct notice to be given for some subsequent day upon which he may try the appeals. 57 V. c. 56, s. 44.

45. At the court so holden the judge shall hear the appeals, and may adjourn the hearing from time to time, but shall deliver judgment not later than 30 days after the hearing. 57 V. c. 56, s. 45.

**Clerk of court.**     **46.**—(1) The clerk of the municipality shall be the clerk of such court, and shall record the proceedings thereof and shall have the like powers as the clerk of a division court as to the issuing of subpoenas to witnesses upon the application of any party to the proceedings or upon an order of the judge for the attendance of any person as a witness before him.

**Witness fees.**     (2) The fees to be allowed to witnesses upon an appeal to the judge under this Act shall be those allowed to witnesses in an action in the division court. 57 V. c. 56, s. 46.

**Powers of  
judge on ap-  
peal.**

**47.** In all proceedings before the county judge as aforesaid, he shall possess all such powers for compelling the attendance of and for the examination on oath of all parties, and all other persons whatsoever, and for the production of books, papers and documents, and for the enforcement of his orders, decisions and judgments as belong to or might be exercised by him in the division court or county court. 57 V. c. 56, s. 47.

#### *Fees and Costs of Appeals.*

**Apportion-  
ment of costs  
—enforcing  
payment.**

**48.** The costs of any proceeding before the court of revision, or before the judge as aforesaid, shall be paid or apportioned between the parties in such manner as the court or judge thinks fit, and the same shall be enforced when ordered by the court of revision by a distress warrant under the hand of the clerk and the corporate seal of the municipality, and when ordered by the judge, by execution to be issued as the judge may direct, either from the county court or any division court within the county in which the municipality is situate. 57 V. c. 56, s. 48.

**What costs  
may be award-  
ed—taxation  
of.**

**49.** The costs chargeable or to be awarded in any case may be the costs of witnesses and of procuring their attendance and none other, and the same shall be taxed according to the allowance in the division court for such costs, and in cases where execution issues, the costs thereof as in the like court, and of enforcing the same, may also be collected thereunder. 57 V. c. 56, s. 49.

50. The judge shall be entitled to receive from the municipality as his expenses for holding court in any place in the municipality, other than the county town, for the hearing of appeals from the court of revision, the sum of five dollars per day and disbursements necessarily incurred. 57 V. c. 56, s. 50.

Fees and expenses of judge.

51. The decision of the county judge as aforesaid shall be final and conclusive. 57 V. c. 56, s. 51.

Decision to be final.

52. Any change in the assessment of the engineer or surveyor made by the court of revision or judge in appeal therefrom, shall be given effect to by the clerk of the municipality altering the assessments and other parts of the schedule to comply therewith, and the by-law shall before the final passing thereof be amended to carry out any changes so made by the court of revision or judge. 57 V. c. 56, s. 52.

Clerk to alter assessments conformably with result of appeals.

ISSUE OF DEBENTURES.

53. Any municipal council issuing debentures under this Act, may include the interest on the debentures in the amount payable, in lieu of the interest being payable annually in respect of each debenture, and any by-law authorizing the issue of debentures for a certain amount and interest, shall be taken to authorize the issue of debentures, in accordance with this section, to the same amount with interest added. 57 V. c. 56, s. 53.

Debentures may include principal and interest in one sum.

54. Any owner of lands or roads, including the municipality assessed for the work, may pay the amount of the assessment against him or them, less the interest, at any time before the debentures are issued, in which case the amount of debentures shall be proportionately reduced. 57 V. c. 56, s. 54.

Payment of assessment before debentures issue.

55. No debentures issued or to be issued under any by-law for the construction or maintenance of any drainage work, shall be held to be invalid on account of the same not being expressed in strict accordance with such by-law, provided that the debentures are for sums in the aggregate not

Informalities not to invalidate debentures.

exceeding the amount authorized by the by-law. 57 V. c. 56, s. 55.

When debentures to be valid and binding to extent of amount advanced.

**56.** Any debentures issued and sold to provide any sum of money for the construction or repairs of any drainage work, shall be good in the hands of the purchaser, and be binding upon the corporation issuing them, to the extent of the money actually advanced on the security, and interest thereon, according to the provisions of same, provided no application to quash be made within six weeks from the final passing of the by-law authorizing the issue thereof, notwithstanding the by-law be afterwards quashed or declared illegal in any proceedings. 57 V. c. 56, s. 56.

#### WORK NOT CONTINUED IN ANOTHER MUNICIPALITY.

Drainage work not continued into another municipality.

**57.—(1)** Where any drainage work is not continued into any other than the initiating municipality, any lands or roads in the initiating municipality or in any other municipality, or roads between two or more municipalities, which will, in the opinion of the engineer or surveyor, be benefited by such work or furnished with an improved outlet or relieved from liability for causing water to flow upon and injure lands or roads, may be assessed for such proportion of the cost of the work as to the engineer or surveyor seems just.

**(2)** A drainage work shall not be deemed to be continued into a municipality other than the initiating municipality, merely by reason of such drainage work or some part thereof being constructed on a road allowance forming the boundary line between two or more municipalities. 57 V. c. 56, s. 57.

Construction of drainage work on road allowance.

**58.** Where it is necessary to construct any drainage work or any part thereof on a road allowance used as a boundary line between two or more municipalities, the municipal council or councils of the adjoining municipalities may, on the petition of the majority of owners in the area therein described and within its own limits, authorize the same to be constructed on the allowance for road between the municipalities, and make the road as provided by section 10, and the engineer

or surveyor may assess and charge the lands and roads benefited or otherwise liable to assessment in the adjoining municipality or municipalities, as well as the road allowance, with such proportion of the cost of constructing the said work as he may deem just. 57 V. c. 56, s. 58.

WORK CONTINUED INTO ANOTHER MUNICIPALITY.

59. Where it is required to continue any drainage work beyond the limits of the municipality, the engineer or surveyor employed by the council of such municipality may continue the survey and levels on or along or across any allowance for road or other boundary between any two or more municipalities, and from any such road allowance or other boundary into or through any municipality until he reaches a sufficient outlet, and in every such case he may assess and charge regardless of municipal boundaries, all lands and roads to be affected by benefit, outlet or relief, with such proportion of the cost of the work as to him may seem just, and in his report thereon he shall estimate separately the cost of the work within each municipality and upon the road allowances or other boundaries. 57 V. c. 56, s. 59.

Continuing work beyond the limits of municipality.

Re Raleigh and Harwich, 2 C. & S. 12; Wigle vs. Gosfield South and Gosfield North, 2 C. & S. 186; Plympton vs. Sarnia, 2 C. & S. 223; Byrne vs. North Dorchester, 2 C. & S. 318.

60. Whenever any lands or roads in or under the jurisdiction of any adjoining or neighbouring municipality, other than the municipalities into or through which the drainage work passes, are, in the opinion of the engineer or surveyor of the initiating or other municipality doing the work or part thereof, benefited by the drainage work or provided with an improved outlet or relieved from liability for causing water to flow upon and injure lands or roads, he may assess and charge the same as is provided in the next preceding section. 57 V. c. 56, s. 60.

Charging neighboring municipality when work does not enter same.

Harwich vs. Raleigh, No. 2, 1 C. & S. 147, 157; Broughton vs. Grey, 1 C. & S. 169; Gosfield South vs. Mersea, 1 C. & S. 268; Gosfield South vs. Gosfield North, 1 C. & S. 342.

## SETTLING ASSESSMENTS, ETC., BETWEEN MUNICIPALITIES.

Council of initiating municipality to serve other municipalities to be affected.

**61.** The council of any initiating municipality shall serve the head (a) of the municipality or municipalities into or through which the work is to be continued, or whose lands or roads are assessed without the drainage work being continued into it, with a copy of the report, plans, specifications, assessments and estimates of the engineer or surveyor on the proposed work, and unless the same are appealed from as hereinafter provided, they shall be binding on each and every corporation whose council is so served, and the council of the initiating municipality shall be entitled, in the event of no appeal, to proceed with the by-law, and authorize and construct or procure the construction of the whole drainage work in accordance therewith. 57 V. c. 56, s. 61.

(a) *Malahide vs. Dereham*, 1 C. & S. 243.

Municipality served to raise and pay over its proportion of costs.

**62.** The council of the municipality so served, shall in the same manner as nearly as may be, and with such other provisions as would have been proper if a majority of the owners of the lands to be taxed had petitioned as provided in section 3 of this Act, pass a by-law or by-laws to raise, and shall raise and pay over to the treasurer of the initiating municipality within four months from such service, the sum that may be named in the report as its proportion of the cost of the drainage work, or, in the event of an appeal from the report, the sum that may be determined by the referee or court of appeal, and such council shall hold the court of revision for the adjustment of assessments upon its own rate-payers in the manner hereinbefore provided. 57 V. c. 56, s. 62.

*Broughton vs. Grey*, 1 C. & S. 169; *Tilbury West vs. Romney*, 2 C. & S. 352.

Appeal to referee from report of engineer.

**63.**—(1) The council of any municipality served as provided by section 61 may, within thirty days after such service upon its head, appeal to the referee from the report, plans, specifications, assessments and estimates of the engineer or surveyor, by serving the head of the council from

which they received the copy and also the head of the council of any other municipality assessed by the engineer or surveyor with a written notice of appeal, setting forth therein the reasons for such appeal.

*Malahide vs. Dereham*, 1 C. & S. 243; *Tilbury East vs. Romney*, 1 C. & S. 261.

(2) The reasons of appeal which shall be set out in such notice may be the following or any of them:—

Grounds of appeal.

(a) Where the assessment against the appealing municipality exceeds \$1,000, or exceeds the estimated cost of the work in the initiating municipality,

1. That the scheme of the drainage work as it affects the appealing municipality should be abandoned or modified, on grounds to be stated;
2. That such scheme does not provide for a sufficient outlet;

*Re Raleigh vs. Harwich*, 2 C. & S. 12.

3. That the course of the drainage work, or any part thereof, should be altered;
4. That the drainage work should be carried to an outlet in the initiating municipality or elsewhere.

*Malahide vs. Dereham*, 1 C. & S. 243; *Gosfield South vs. Mersea*, 1 C. & S. 268; *Raleigh vs. Harwich*, 1 C. & S. 348.

(b) In any case not otherwise provided for,—

1. That a petition has been received by the council of the appealing municipality, as provided by section 3 of this Act, from the majority of the owners within the area described in the petition, praying for the enlargement by the appealing municipality of any part of the drainage work lying within its limits, and thence to an outlet, and that the council is of opinion that such enlargement is desirable to afford drainage facilities for the area described in the petition.
2. That such appealing municipality objects to paying over its proportion of the cost of the work to the treasurer of the initiating municipality.



3. That the initiating municipality should not be permitted to do the work within the limits of the appealing municipality.
4. That the assessment against lands and roads within the limits of the appealing municipality and roads under its jurisdiction is illegal, unjust or excessive.

57 V. c. 56, s. 63.

Powers of  
referee on  
appeal.

**64.**—(1) Upon an appeal under the preceding section the referee shall hear and adjudicate upon all questions raised by the notice of appeal, and the reasons for such appeal stated therein as they may affect any municipality assessed for the drainage work; and he may give to any municipality through or into which the proposed work will be continued, leave to enlarge the same, pursuant to petition in that behalf and according to the report, plans, specifications, assessments and estimates of an engineer appointed by the referee for that purpose, and may make such order in the premises and as to costs already incurred, and as to costs of the appeal, as may seem just.

Appeal to  
Court of  
Appeal.

(2) The order of the referee upon such appeal shall be subject to appeal to the Court of Appeal, as in other cases, and the decision of the Court of Appeal shall be final and conclusive as to all corporations affected thereby.

Abandonment  
of work by  
initiating  
municipality

(3) The council of the initiating municipality may, by resolution passed within thirty days after the decision of the referee on the appeal to him, or in case of an appeal therefrom after the hearing and determination thereof, abandon the proposed drainage work, subject to such terms as to costs and otherwise as to the referee or the Court of Appeal may seem just. 57 V. c. 56, s. 64.

#### ASSESSMENT FOR CUT OFF.

Benefit by  
cut off.

**65.** Any lands or roads from which the flow of surface water is by any drainage work cut off, may be assessed and charged for same by the engineer or surveyor of the munici-

pality doing the work, and such assessment shall be classified and scheduled as benefit. 57 V. c. 56, s. 65.

## AMENDING BY-LAW.

66.—(1) Any by-law heretofore passed or which may be hereafter passed by the council of any municipality for the assessment upon the lands and roads liable to contribute for any drainage work and which has been acted upon by the doing of the work in whole or in part, but does not provide sufficient funds to complete the drainage work or the municipality's share of the cost thereof, or does not provide sufficient funds for the redemption of the debentures authorized to be issued thereunder as they become payable, may from time to time be amended by the council, and further debentures may be issued under the amending by-law in order to fully carry out the intention of the original by-law.

Amendment  
of by-law  
when insuffi-  
cient funds  
provided.

(2) Where in any such case lands and roads in another municipality are assessed for the drainage work the council of the initiating municipality shall procure an engineer or surveyor to make an examination of the work and to report upon it with an estimate of the cost of completion for which sufficient funds have not been provided under the original by-law, and shall serve the heads of the other municipalities as in the case of the original report, plans, specifications, assessments and estimates, and the council of any municipality so served shall have the same right of appeal to the referee as to the improper expenditure or illegal or other application of the drainage money already raised, and shall be subject to the same duty as to raising and paying over its share of the money to be raised, as in the case of the original by-law is provided by sections 62 and 63.

When lands  
and roads  
in another  
municipality  
assessable.

(3) Any by-law already passed or hereafter passed for the assessment upon the lands and roads liable to contribute for any drainage work and acted upon by the completion of the work, which provides more than sufficient funds for the completion of or proper contribution towards the work or for the redemption of the debentures authorized to be issued

Amendment  
of by-law and  
distribution of  
surplus.

thereunder as they become payable, shall be amended, and if lands and roads in any other municipality are assessed for the drainage work the surplus money shall be divided *pro rata* among the contributing municipalities, and every such surplus until wholly paid out shall be applied by the council of the municipality *pro rata* according to the assessment in payment of the rates imposed by it for the work in each and every year after the completion of the work. 57 V. c. 56, s. 66.

Amendment  
of by-law not  
providing  
sufficient  
funds.

(4) Any by-law passed prior to the 1st day of June, 1894, by the council of any county or union of counties for the assessment of the cost of any drainage work upon the lands and roads liable to contribute therefor which has been acted upon by the doing of the work in whole or in part and which does not provide sufficient funds to complete the drainage work, or the share of the said county or union of counties of the cost thereof, or does not provide sufficient funds for the redemption of the debentures issued under such by-law as they became payable, may from time to time be amended by the council and further debentures may be issued under the amending by-law in order to fully carry out the intention of the original by-law, provided that every such drainage work shall, when fully completed, be maintained as provided in section 70 of this Act. 58 V. c. 55, s. 1.

Issuing de-  
bentures for  
completion of  
county drain-  
age works  
commenced  
before 57 V.  
c. 56.

Publication  
of amending  
by-laws.

67. It shall be in the discretion of the council whether an amending by-law, passed under any of the provisions of the preceding section, shall be published or not, and the provisions of *The Municipal Drainage Aid Act* shall apply to any debentures issued under the authority of the said section, which have heretofore been or may hereafter be purchased by direction of the Lieutenant-Governor in Council. 57 V. c. 56, s. 67; 58 V. c. 55, s. 2.

#### MAINTENANCE OF DRAINAGE WORK.

Maintenance  
of work not  
continued  
into another  
municipality.

68. Any drainage work which has been heretofore constructed under a by-law of any municipality passed in pursuance of any Act relating to the construction of drainage work by local assessment, or which is hereafter constructed by

a municipality under the provisions of this Act, and which is not continued into any other municipality, shall after the completion thereof be maintained (a) by the initiating municipality.

- (a) If no lands or roads in any other municipality are assessed for the construction thereof, then at the expense of the lands and roads in the initiating municipality in any way assessed for such construction, according to the assessment of the engineer or surveyor in his report and assessment for the original construction of such drainage work, or,
- (b) If lands or roads in any other municipality, or roads between two or more municipalities are in any way assessed for the construction of such drainage work, then at the expense of all the lands and roads in any way assessed for such construction in the municipalities affected, and in the proportion determined by such report and assessment, or in appeal therefrom by the award of arbitrators or order of the referee,—

Unless or until such assessment or proportion as the case may be, is varied or otherwise determined from time to time by the report and assessment of an engineer or surveyor for the maintenance of the drainage work, or in appeal therefrom by the award of arbitrators or order of the referee. 57 V. c. 56, s. 68.

- (a) *Fewster vs. Raleigh*, 1 C. & S. 227.

69. Any drainage work heretofore constructed under a by-law of a municipality, passed in pursuance of any Act relating to the construction of any drainage work by local assessment, or hereafter constructed under the provisions of this Act, which is continued into or through more than one municipality, or which is commenced by the initiating municipality on a road allowance adjoining such municipality and is continued thence into the lands of any other municipality, shall after the completion thereof be maintained (a) by the

Maintenance of drainage work passing into another municipality.

initiating municipality from the point of commencement of the drainage work in the municipality or upon such road allowance to the point at which the drainage work crosses the boundary line between any road allowance and lands in another municipality, and by such last mentioned municipality and by every other municipality through or into which the drainage work is continued from the point at which the drainage work crosses the boundary line between a road allowance and lands in the municipality to an outlet in the municipality or on a road allowance adjoining the municipality or to the point at which the drainage work crosses the boundary line between any road allowance and lands in another municipality, as the case may be, at the expense of the lands and roads in any way assessed for the construction thereof and in the proportion determined by the engineer or surveyor in his report and assessment for the original construction or in appeal therefrom by the award of arbitrators or order of the referee, unless and until, in the case of each municipality, such provision for maintenance is varied or otherwise determined by an engineer or surveyor in his report and assessment for the maintenance of the drainage work or in appeal therefrom by the award of arbitrators or order of the referee. 57 V. c. 56, s. 69.

(a) *Fewster vs. Raleigh*, 1 C. & S. 227.

Maintenance of drains constructed by government or under county by-laws.

70.—(1) Where a drainage work constructed before the 5th day of May, 1894, under the provisions of *The Ontario Drainage Act* or any Act in amendment thereof or under a by-law passed by a county council, does not extend beyond the limits of one municipality, such drainage work shall be maintained and kept in repair (a) by such municipality at the expense of the lands and roads in any way liable to assessment under the provisions of this Act.

When such drains extend into another municipality.

(2) Any drainage work constructed before the 5th day of May, 1894, under *The Ontario Drainage Act* or any Act in amendment thereof or under a by-law passed by a county council, (b) which continues from the municipality in which the drainage work commences into or through one or more

other municipalities, shall be maintained and kept in repair by the municipality in which the drainage work commences, from the point of commencement to the point at which the drainage work crosses the boundary line between any road allowance and lands in another municipality or to the outlet on such road allowance as the case may be, and by every other municipality through or into which the drainage work is continued from the point at which the same crosses the boundary line between any road allowance and lands in the municipality, and enters upon such lands to an outlet in the municipality, or on a road allowance adjoining the municipality, or to the point at which the drainage work crosses the boundary line between any road allowance and lands in an adjoining municipality, as the case may be, at the expense of the lands and roads in any way assessed for the construction thereof, and in the proportion determined by the assessors or engineer or surveyor in their assessment roll or report as the case may be, for construction, or in appeal therefrom by the award of arbitrators or order of the referee, unless and until in the case of each municipality such provision for maintenance is varied or otherwise determined by an engineer or surveyor in his report and assessment for the maintenance of the drainage work or in appeal therefrom by the award of arbitrators or order of the referee (c).

(3) A drainage work which commences on a road allowance between two municipalities, shall, for the purposes of this section, be deemed to commence in the municipality next adjoining that half of the road allowance upon which the drainage work is begun. 57 V. c. 56, s. 70.

(a) *Fewster vs. Raleigh*, 1 C. & S. 227.

(b) *Gosfield North vs. Rochester*, 1 C. & S. 182; *Mersea vs. Rochester*, 2 C. & S. 60.

(c) *Caradoc vs. Ekfrid*, 1 C. & S. 295.

71.—(1) The council of any municipality undertaking the repair of any drainage work under sections 68, 69 or 70 of this Act, shall, before commencing the repairs, serve upon the head of any municipality liable to contribute any portion of the cost of such repairs under the provisions of this Act, Service of by-law on municipality in which lands are assessed without drain being continued into it.

Appeals from  
Referee.

a certified copy of the by-law for undertaking the repairs, as the same is provisionally adopted, which by-law shall recite the description, extent and estimated cost of the work to be done and the amount to be contributed therefor by each municipality affected by the drainage work; and the council of any municipality so served may, within thirty days thereafter, appeal from such by-law to the referee on the ground that the amount assessed against lands and roads in such municipality is excessive or that the work provided for in the by-law is unnecessary, or that such drainage work has never been completed through the default or neglect of the municipality whose duty it was to do the work, in the manner provided in the case of the construction of the drainage work, and the referee on such appeal may alter, amend or confirm such by-law, or may direct that the same shall not be passed, as to him may seem just.

The order of the referee upon such appeal shall be subject to appeal of the Court of Appeal for Ontario, and the decision of the Court of Appeal for Ontario shall be final and conclusive as to all corporations affected thereby. 1 Edw. VII. c. 30, s. 1.

Council served  
to raise and  
pay over  
amount  
required.

(2) The council of every municipality served with the provisional by-law shall, within four months after such service, pass a by-law to raise, and shall, within said period of four months, raise and pay over to the treasurer of the initiating municipality the amount assessed against lands and roads in the municipality, as stated in the provisional by-law or as settled on appeal therefrom by the order of the referee. 57 V. c. 56, s. 71.

#### VARYING ASSESSMENT.

Varying  
assessment  
for main-  
tenance.

72.—(1) The council of any municipality liable for the maintenance of any drainage work may from time to time as the same requires repairs vary the proportions of assessment for maintenance, on the report and assessment of an engineer appointed by the council to examine and report on the condition of the work, or the portion thereof, as the case may be.

which it is the duty of the municipality as aforesaid to maintain and on the liability to contribute of lands and roads which were not assessed for construction, and have become liable to assessment under this Act; and the engineer or surveyor may in his report upon such repairs assess lands and roads in the municipality undertaking the repairs and in any other municipality from which water flows through the drainage work into the municipality undertaking the repairs; but he shall not, except after leave given by the referee on an application of which notice has been given to the head of every municipality affected, assess for such repairs any lands or roads lying in any municipality into which water flows through the drainage work from the municipality undertaking the repairs.

(2) The proceedings upon such report and assessment shall be the same, as nearly as may be, as upon the report for the construction of the drainage work. Proceedings on report of engineer.

(3) Any council served with a copy of such report and assessment may appeal from the finding of the engineer as to the proportion of the cost of the work for which the municipality is liable, to the referee, and the proceedings on such appeal shall be the same as in other cases of appeals to the referee under this Act. Appeal from report of engineer.

(4) Any owner of lands and any ratepayer in the municipality as to roads assessed for such repairs may appeal from such assessment in the manner provided in the case of the construction of the drainage work, and the council of every municipality affected by the report of the engineer or surveyor made under this section shall appoint a court of revision for the trial of any appeals in the manner hereinbefore provided. 57 V. c. 56, s. 72. Appeal to court of revision.

Edwardsburgh vs. Matilda, 2 C. & S. 291; Caradoc vs. Ekfrid, 1 C. & S. 295.

73. Any municipality neglecting or refusing to maintain (a) any drainage work as aforesaid, upon reasonable notice in writing (b) from any person or municipality interested Power to compel repairs by mandamus.



therein who or whose property is injuriously affected by the condition of the drainage work, shall be compellable, by mandamus (*c*) issued by the referee or other court of competent jurisdiction, to maintain the work, unless the notice is set aside or the work required thereby is varied as hereinafter provided, and shall also be liable in pecuniary damages (*d*) to any person or municipality who or whose property is injuriously affected by reason of such neglect or refusal (*e*).

Proviso.

(a) Provided nevertheless, that any municipality, after receiving such notice, may, within fourteen days thereafter, apply to the referee to set aside the notice; such application may be made upon four days' notice to the party who gave the notice to the municipality, and the referee shall, after hearing the parties and any witnesses that may be called or other evidence, adjudicate upon the question in issue, confirm or set aside the notice, as to him may seem proper, or order that the said work of maintenance shall be done wholly or in part, and the costs of and concerning the said motion shall be in the discretion of the referee except as hereinafter mentioned, and may be taxed upon the county or division court scale, as the referee may direct.

Giving notice  
to repair  
maliciously.

(b) Should the referee find that the notice to the municipality was given maliciously or vexatiously, or without any just cause, or to remove an obstruction which under this Act it was the duty of the party giving the notice to remove, he shall, notwithstanding anything hereinbefore contained, order the costs to be paid by the party giving the notice.

Costs to be  
paid out of  
general funds.

(c) Any costs which the municipality may be called upon to pay, by reason of any proceedings in these clauses mentioned, shall be paid out of its general funds.

Appeal to  
Court of  
Appeal.

(d) Any party to such proceedings may, except on a question of costs, by leave of the referee or special leave of the Court of Appeal, or a judge thereof, appeal

to the Court of Appeal from the decision or judgment of the referee, and the proceedings in and about such appeal shall be the same, as nearly as may be, as upon an appeal from the decision or judgment of the referee as is hereinafter provided.

- (e) Upon any such appeal the court may determine whether a mandamus shall issue or otherwise, and may make such order as may seem just. Powers of court of appeal.
- (f) A mandamus against the municipality shall not, in any case, be moved for until after the lapse of thirty days from the date of the service of the notice upon the municipality. Thirty days' notice to be given. 57 V. c. 56, s. 73.

(a) *Fewster vs. Raleigh*, 1 C. & S. 227; *Peltier vs. Dover*, 1 C. & S. 323; *Rayfield vs. Amaranth*, 2 C. & S. 283.

(b) *Wickens vs. Sombra*, 1 C. & S. 106; *Clarke vs. Sombra*, 1 C. & S. 110; *Crawford vs. Ellice*, 2 C. & S. 151; *McKim vs. East Luther*, 2 C. & S. 229.

(c) *Gahen vs. Mersea*, 1 C. & S. 140; *Carruthers vs. Moore*, 1 C. & S. 142; *Fairbairn vs. Sandwich South*, 2 C. & S. 133.

(d) *Raleigh vs. Williams*, 1 C. & S. 1.

(e) *Ford vs. Moore*, 1 C. & S. 137; *Stephens vs. Moore*, 1 C. & S. 283; *Crawford vs. Ellice*, 2 C. & S. 151.

#### REPAIRING WITHOUT REPORT.

74. The council of any municipality, whose duty it is to maintain any drainage work for which only lands and roads within or under the jurisdiction of such municipality are assessed, may, after the completion of the drainage work, without the report of an engineer or surveyor upon a *pro rata* assessment on the lands and roads as last assessed for the construction or repair of the drainage work, make improvements thereto by deepening, widening or extending the same to an outlet, provided the cost of such deepening, widening and extending is not above one-fifth of the cost of the construction and does not exceed in any case \$400, and in every case where the cost of said improvements exceeds such proportion or amount, the proceedings to be taken shall be as provided in section 75 of this Act. 57 V. c. 56, s. 74; 1 Edw. VII. c. 30, s. 2.

*Rayfield vs. Amaranth*, 2 C. & S. 283.

## REPAIRING UPON REPORT.

Repairing  
upon exami-  
nation and re-  
port by  
engineer.

**75.** Wherever, for the better maintenance of any drainage work constructed under the provisions of this Act, or any Act respecting drainage by local assessment, or to prevent damage to any lands or roads, it is deemed expedient to change the course of such drainage work, or make a new outlet for the whole or any part of the work, or otherwise improve, extend, or alter the work, or to cover the whole or any part of it, the council of the municipality or of any of the municipalities whose duty it is to maintain the said drainage work, may, without the petition required by section 3 of this Act, but on the report of an engineer or surveyor appointed by them to examine and report on the same, undertake and complete the change of course, new outlet, improvement, extension, alteration or covering specified in the report, and the engineer or surveyor shall for such change of course, new outlet, improvement, extension, alteration or covering, have all the powers to assess and charge lands and roads in any way liable to assessment under this Act for the expense thereof in the same manner, and to the same extent, by the same proceedings and subject to the same rights of appeal as are provided with regard to any drainage work constructed under the provisions of this Act. 57 V. c. 56, s. 75.

Chatham vs. Dover, 1 C. & S. 117; Harwich vs. Raleigh, No. 2. 1 C. & S. 147, 157; Tindell vs. Ellice, 1 C. & S. 247; Tilbury E. vs. Romney, 1 C. & S. 261; Caradoc vs. Ekfrid, 1 C. & S. 295; Gosfield S. vs. Gosfield N., 1 C. & S. 342; Re Raleigh vs. Harwich, 2 C. & S. 12; Mersea vs. Rochester, 2 C. & S. 60; Sutherland vs. Romney, 2 C. & S. 96; Plympton vs. Sarmia, 2 C. & S. 223; Rayfield vs. Amaranth, 2 C. & S. 283; Camden vs. Dresden, 2 C. & S. 308.

## REPAIRING WORK CONSTRUCTED OUT OF GENERAL FUNDS.

Assessment  
for repair of  
work con-  
structed out of  
general funds.

**76.** Any drainage work heretofore or hereafter constructed out of the general funds of any municipality, or out of the general funds of two or more municipalities, or when constructed by statute labor or partly by statute labor and partly by general funds, or out of funds raised by a local assessment under a by-law which is afterwards found to be illegal or

which does not provide for repairs, need not be repaired out of such general funds, but the council of any of the contributing municipalities may, without the petition required by section 3, on the report of an engineer or surveyor pass a by-law for maintaining the same at the expense of the lands and roads assessable for such work, and may assess the lands and roads in any way liable to assessment under this Act, for the expense thereof in the same manner, and to the same extent, by the same proceedings and subject to the same rights of appeal as are provided with regard to any drainage work constructed under the provisions of this Act. 57 V. c. 56, s. 76; 63 V. c. 38, s. 1.

PAYING BACK ADVANCES.

77. Any moneys which have been or may hereafter be advanced by the council of any municipality out of its general funds for the purpose of any drainage work, in anticipation of the levies and collections therefor, shall be repaid into the general funds of the municipality as soon as the moneys first derived from the assessment are collected. 57 V. c. 56, s. 77.

Repayment  
of advances  
from general  
funds on  
receipt of  
assessments.

77a. It shall be lawful for the council of any municipality to pass a by-law or by-laws providing that it shall be the duty of the owner of every lot or part of a lot assessed for benefit to clean out the drain and keep the same free from obstructions which may hinder or impede the free flow of the water, and to remove therefrom all weeds and brush-wood and to keep the banks of the drain in order to the extent and in manner or proportion and for the distance determined by the engineer in his report, and in case any such owner makes default in so doing for thirty days after notice in writing from the council of the municipality, the work may be done by the said council or by any officer appointed by them for the purposes of the said drain and the cost thereof, after notice of the same to the person so making default and liable therefor shall be placed on the collector's roll against the lands of such owner and shall be chargeable against the said lands and be collected in the same manner as other municipal or drainage assessments. 63 V. c. 38, s. 2.

Duty of owners as to  
cleaning out  
and keeping  
banks in order

## MINOR REPAIRS.

Persons responsible for obstruction to remove same on notice.

**78.**—(1) When any drainage work, heretofore or hereafter constructed, becomes obstructed by dams, low bridges, fences, washing out of private drains, or other obstructions, for which the land adjoining the drainage work or the owner or person in possession thereof is responsible, so that the free flow of the water is impeded thereby, the persons owning or occupying the land shall, upon reasonable notice in writing given by the council or by an inspector appointed by the council for the inspection and care of drains, remove such obstructions in any manner caused as aforesaid, and if not so removed within the time specified in the notice, the council or the said inspector shall forthwith cause the same to be removed.

Inspector of drains.

(2) The council may, by by-law, appoint an inspector for the purposes mentioned in the preceding sub-section, and shall in the by-law regulate the fees or other remuneration to be received by him.

Collection of cost of removal by municipality.

(3) If the cost of removing such obstruction is not paid by the owner or occupant of the lands liable, to the municipality forthwith after the completion of the work, the council may pay the same, and the clerk of the municipality shall place such amount upon the collector's roll against the lands liable, with ten per cent. added thereto, and the same shall be collected like other taxes, subject, however, to an appeal by the owner or occupant, in respect of the cost of the work, to the judge of the county court of the county in which the lands are situate. 57 V. c. 56, s. 78.

## CUTTING EMBANKMENTS, BANKS, ETC.

Penalty for injury to embankments, etc.

**79.** Any person who obstructs, fills up or injures any drainage work, or destroys, cuts or injures any embankment of any pumping works, or of any other drainage work, shall, in addition to his liability in civil damages therefor, upon the complaint of the council of the municipality or of any person affected by such obstruction, filling up, destroying,

cutting, or injuring, be liable upon summary conviction thereof, before a justice of the peace, to a fine of not less than \$5 nor more than \$100 and costs of conviction, or to imprisonment with or without hard labour for any term not exceeding six months, or in default of payment of such fine and costs or costs only, to imprisonment for any term not exceeding three months. 57 V. c. 56, s. 79.

## REMOVING ARTIFICIAL OBSTRUCTIONS.

80. Wherever, in the construction of any drainage work any dam or other artificial obstruction exists in the course of or below the work, and is situate wholly within the municipality doing the work, the council shall have power, with the consent of the owner thereof and of the council or councils of the other municipalities liable to assessment for the cost of the work, and upon payment of such purchase money as may be mutually agreed upon, or in default of agreement be determined by the referee, to remove the same wholly or in part; and any amount so paid or payable as purchase money shall be deemed part of the cost of construction and be provided for in the assessment by the engineer or surveyor. 57 V. c. 56, s. 80.

Augusta vs. Oxford, 1 C. & S. 345; Elizabethtown vs. Augusta, 2 C. & S. 363, 378.

## OPERATING PUMPING WORKS.

81.—(1) For the better maintenance of drainage work by embanking, pumping or other mechanical operations, the council of the municipality initiating the work may pass by-laws appointing one or more commissioners from among those whose lands are assessed for constructions, who shall have power to enter into all necessary and proper contracts for the purchase of fuel, erection or repairs of buildings, and purchase and repairs of machinery, and to do all other things necessary for successfully operating such drainage work, as may be set forth in the by-law appointing them; and the council may pass by-laws for defraying the annual cost of maintaining and operating the work by assessment upon the

Removal of  
dams, etc.,  
on construction  
of work.

Appointment  
of commis-  
sioners for  
pumping  
works, etc.

lands and roads in any way liable for assessment under the provisions of this Act. 57 V. c. 56, s. 81.

Commissioners of pumping works.

(2) Upon the petition of two-thirds of the resident owners in the drainage territory, the council of the municipality may pass by-laws empowering the commissioner or commissioners appointed under this section to use all buildings, machinery and equipments belonging to and in connection with any drainage pumping works, and to operate the same for such purposes and upon such terms as may be set forth in such by-laws, upon the condition that the profits or benefits of such user shall accrue to the owners. 59 V. c. 66, s. 2.

Assuming pumping works, etc. constructed by private persons.

82. Upon the petition of two-thirds of the persons interested in any drainage work constructed by embanking, pumping or other mechanical operations, and not constructed by the municipality, the council of the municipality in which the work is situate may assume the work and maintain and operate the same, in the same manner and to the same extent as if the said drainage work had been constructed under the provisions of this Act, but at the cost of the lands and roads liable to be assessed for the work. 57 V. c. 56, s. 82.

#### DEBENTURES FOR MAINTENANCE.

Powers to issue debentures for cost of maintenance. Rev. Stat. c. 40.

83. Where the maintenance of any drainage work is so expensive that the municipal council liable therefor deems it inexpedient to levy the cost thereof in one year, the said council may pass a by-law to borrow, upon the debentures of the municipality, the amount necessary for the work, or its proportion thereof, and shall assess, and levy upon the lands and roads liable therefor a special rate sufficient for the payment of the debentures. Where such debentures are issued for the cost of repair, such as change of course, new outlet, improvement, extension, alteration or covering pursuant to the provisions of section 75 of this Act, such debentures shall be payable within twenty years from the date thereof, and where such debentures are issued for the cost of repairs pursuant to any other sections of this Act, such debentures

shall be payable within seven years from the date thereof. The provisions of the Municipal Drainage Aid Act shall apply to any debentures issued under the authority of any such by-law, which has before its final passing been published or of which the ratepayers have been notified in manner provided by this Act, or which has, after its passing, been promulgated as required by section 375 of the Municipal Act. 57 V. c. 56, s. 83; 63 V. c. 38, s. 3.

Sutherland vs. Romney, 2 C. & S. 85.

MAKING AWARD DRAINS MUNICIPAL.

84. Upon a petition presented to the council of any municipality as provided for in section 3 of this Act, having within the area described therein any drain constructed under The Ditches and Watercourses Act or any other Act providing for assessment in work, signed by a majority of the owners interested in such ditch or drain, the said council may assume the same and proceed thereon in the same manner and to the same extent as for the construction of any drainage work under the provisions of this Act, and the passing of the by-law under the provisions of this Act shall in every such case be a bar to any further proceedings upon the award or under the provisions of the Act upon which such award is based. 57 V. c. 56, s. 84.

Power to bring drains constructed by under Rev. Stat., 283, within this Act.

WORK ON RAILWAY LANDS.

85.—(1) The council of any municipality may enter into an agreement with any railway company for the construction or enlargement by the railway company of any work on the lands of such railway company into or through which a drainage work constructed under this Act may pass, and for the payment of the cost of such work, after completion, out of the general funds of the municipality, and the amount so paid shall be assessed against the lands and roads liable for the construction or maintenance of the drainage work, and shall be deemed part of the cost of the drainage work, and be included in the amount chargeable against lands and roads

Work on railway lands.



liable therefor according to the report and estimates of the engincer or surveyor.

(2) No agreement shall be entered into by a municipal council under this section without the consent in writing, filed with the clerk of the municipality, of a majority of the owners liable for the construction or maintenance of the drainage work in respect to which such work on railway lands is to be undertaken. 57 V. c. 56, s. 85.

#### COST OF REFERENCE AND INCIDENTAL EXPENSES.

Certain expenses to be deemed part of the cost of the work.

**86.** Except where otherwise provided by this Act, the cost of any reference had in connection with the construction or maintenance of any drainage work, the cost of the publication or service of by-laws and all other expenses incidental to the construction or maintenance of the work and the passing of the by-laws, shall be deemed part of the cost of such work, and shall be included in the amount to be raised by local rate on all lands and roads liable therefor. 57 V. c. 56, s. 86.

*Elma vs. Ellice*, 2 C. & S. 259.

#### LANDLORD AND TENANT.

Tenant's covenant to pay taxes—when to include drainage assessments.

**87.** Any agreement on the part of any tenant to pay the rate or taxes in respect of the demised lands, shall not include the charges and assessments for any drainage work unless such agreement in express terms so provides; but in cases of contracts to purchase or of leases giving the lessee an option to purchase, the said charges and assessment for drainage work in connection with which proceedings were commenced under this Act, after the date of the contract or lease, and which have been already paid by the owner, shall be added to the price and shall be paid by the purchaser or the lessee in case he exercises his option to purchase; but the amount still unpaid on the cost of the work or repair, and charged against the lands, shall be borne by the purchaser unless otherwise provided by the conveyance or agreement. 57 V. c. 56, s. 87.

## DRAINAGE TRIALS.

88.—(1) The Lieutenant-Governor in Council may from time to time appoint a referee for the purpose of the drainage laws, that is to say, The Ontario Drainage Act, the provisions of this Act and all other Acts and parts of Acts on the same subject, for which this Act is substituted.

Appointment  
of referee.

(2) Such referee shall be deemed to be and shall be an officer of the High Court.

To be deemed  
an officer of  
high court.

(3) He shall be a barrister of at least ten years' standing at the bar of Ontario.

To be a  
barrister of  
ten years  
standing.

(4) He shall hold office by the same tenure as an official referee under The Judicature Act.

Tenure of  
office.

(5) He shall not practice as a solicitor or barrister or act in any capacity as a legal agent or adviser in any matter arising under this Act. 57 V. c. 56, s. 88 (1-5); 60 V. c. 14, s. 77.

Not to  
practice in  
drainage  
matters.

(6) He shall be paid a salary of such amount as may be appropriated by the Legislature for that purpose (not exceeding \$3,500 a year), to be paid monthly, and reasonable travelling expenses. 57 V. c. 56, s. 88.

Salary.

## POWERS OF THE REFEREE.

89.—(1) The referee shall have the powers of an official referee under the Judicature Act and the Arbitration Act, and of arbitrators under any former enactments relating to drainage works, and the referee is substituted for such arbitrators.

Referee to  
have powers  
of an official  
referee under  
Rev. Stat.,  
c. c. 51 & 62.

McClure vs. Brooke, Bryce vs. Brooke, 2 C. & S. 387, 391.

(2) In respect to all applications and proceedings before him or which may come before him under the provisions of this Act, or any former Act relating to drainage works, he shall have the powers of a judge of the High Court of Justice, including the production of books and papers, the amendment (a) of notice of appeal, and of notices for compensation or damages, and of all other notices and proceed-

Powers as to  
compelling  
production,  
amending  
notices, etc.

Granting a  
mandamus or  
injunction.

ings; he may correct errors, or supply omissions, fix the time and place of hearing, appoint the time for his inspection, summon to his aid engineers, surveyors or other experts, and regulate and direct all matters incident to the hearing, trial and decision of the matters before him so as to do complete justice between the parties; he may also grant an injunction (b) or a mandamus in any matter before him under this Act.

(a) *Tindall vs. Ellice*, 1 C. & S. 247; *Adelaide vs. Warwick*, 2 C. & S. 199.

(b) *Gahen vs. Mersea*, 1 C. & S. 140; *Carruthers vs. Moore*, 1 C. & S. 142.

(a and b) *Wigle vs. Gosfield South and Gosfield North*, 2 C. & S. 186.

Power to  
determine  
validity of  
proceedings  
and amend  
report.

(3) The referee shall have power, subject to appeal as hereinafter provided, to determine the validity of all petitions, resolutions, reports, provisional or other by-laws (a), whether objections thereto have been stated as grounds of appeal to him or not, and to amend and correct any provisional by-law in question; and, with the engineer's consent and upon evidence given, to amend the report (b) in such manner as may be deemed just, and upon such terms as may be deemed proper for the protection of all parties interested, and, if necessary by reason of such amendments, to change the gross amount of any assessment made against any municipality, but in no case shall he assume the duties conferred by this Act upon the court of revision or a county judge. 57 V. c. 56, s. 89; 1 Edw. VII. c. 30, s. 3.

(a) *Gosfield North vs. Rochester*, 1 C. & S. 182; *Byrne vs. North Dorchester*, 2 C. & S. 318.

(b) *Gosfield South vs. Mersea*, 1 C. & S. 268; *South Dorchester vs. Malahide*, 1 C. & S. 275; *Mersea vs. Rochester*, 2 C. & S. 47.

Interlocutory  
applications,  
no appeal  
from referee  
thereon.

90. All interlocutory applications for any of the purposes mentioned in sub-section (2) of the last preceding section shall be made to the referee and his order thereon shall be final and conclusive. 57 V. c. 56, s. 90.

*Adelaide and Warwick vs. Metcalfe*, 2 C. & S. 199.

*Appeals from Assessment.*

91. A copy of the notice of appeal by any municipality from the report, plans, specifications, assessments, and estimates of an engineer or surveyor or from a provisionally adopted by-law with an affidavit of service thereof, shall, within the time limited by this Act for the service of the same, be filed in the office of the clerk of the county court of the county or union of counties in which the drainage work commenced. 57 V. c. 56, s. 91.

Notice of  
appeal from  
assessment.

92. The by-law of the initiating municipality and of any other municipalities interested shall be amended so as to incorporate and carry into effect the decision or report of the referee or such decision or report as varied on appeal, as the case may be. 57 V. c. 56, s. 92.

Amendment  
of by-law to  
carry out  
decision of  
referee.

## DAMAGES, COMPENSATION, ETC.

93.—(1) All applications to set aside, declare void, or otherwise directly or indirectly, attack the validity of any petition, report of an engineer, resolution of a council, by-law provisionally adopted or finally passed, relating to a drainage work as hereinbefore defined, as well as all proceedings to determine claims and disputes arising between municipalities or between a company and a municipality or between individuals and a municipality, company or individual, in the construction, improvement or maintenance of any drainage work under the provisions of this Act, or consequent thereon, or by reason of negligence, or for a mandamus or an injunction, shall hereafter be made to and shall be heard or tried by the referee only, who shall hear and determine the same and give his decision and his reasons therefor.

All applica-  
tions, etc.,  
affecting  
drainage  
works to be  
made before  
referee.

*Raleigh vs. Williams*, 1 C. & S. 1; *Hiles vs. Ellice*, 1 C. & S. 65; *Ellice vs. Hiles*, 1 C. & S. 89; *Buchanan vs. Ellice*, 1 C. & S. 254; *Thackery vs. Raleigh*, 1 C. & S. 328.

(2) Proceeding for the determination of claims and disputes and for the recovery of damages by reason of negligence, or by way of compensation or otherwise, or for a man- Procedure.

damus or an injunction, under this section, shall hereafter be instituted by serving a notice claiming damages or compensation, or a mandamus or an injunction, as the case may be, upon the other party or parties concerned, and the notice shall set forth the grounds of claim.

*Wickwire vs. Romney*, 1 C. & S. 179; *McCulloch vs. Caledonia*, 1 C. & S. 340, 2 C. & S. at p. 6; *Murphy vs. Oxford*, 1 C. & S. 350; *Wigle vs. Gosfield South and Gosfield North*, 2 C. & S. 186.

Service of  
notice of  
claim.

(3) A copy of the notice with an affidavit of service thereof shall be filed with the clerk of the county court of the county or union of counties in which the lands in question are situate, and the notice shall be filed and served within two years from the time the cause of complaint arose.

*Tindell vs. Ellice*, 1 C. & S. 247; *Thackery vs. Raleigh*, 1 C. & S. 328; *McCulloch vs. Caledonia*, 1 C. & S. 340; *Re Roden vs. Toronto*, 1 C. & S. 402.

Notice of  
motion.

(4) All applications under this section shall be made by notice of motion based upon affidavits filed, not less than ten days before the date on which the motion shall be made, with the clerk of the county court of the county or counties in which the municipality whose proceeding is called in question is situate.

*Lovett vs. Colchester North*, 1 C. & S. 306.

Proceedings  
to be taken  
under this  
section.

(5) No application or proceeding within the meaning of this section shall be made or instituted otherwise than as therein provided.

#### COURT OF APPEAL TO BE FINAL.

Decision of  
Court of  
Appeal to be  
final.

94. The decision of the referee in all applications and proceedings under this Act, not otherwise provided for as being final and conclusive between the parties, shall be subject to appeal to the Court of Appeal for Ontario, and its decision thereon shall be final, conclusive and binding upon all parties to the application or other proceeding. 1 Edw. VII. c. 30, s. 5.

References in  
ending  
tions.

(2) But nothing herein shall affect pending litigation in respect to the power of the Court or Judge to refer the same

for trial to the said Referee, and this amendment shall have the same force and effect as if it had been passed with and formed part of the said section 5. 2 Edw. VII. c. 32, s. 4.

**95.**—(1) Save as provided by sub-sections 2 and 3 of this section, all damages and costs payable by a municipality and arising from proceedings taken under this Act, shall be levied *pro rata* upon the lands and roads in any way assessed for the drainage work according to the assessment thereof for construction or maintenance, and may be assessed, levied and collected in the same manner as rates assessed, levied and collected for maintenance under this Act.

Assessing damages and costs payable by municipalities.

(2) Where such damages and costs become payable owing to any improper action, neglect, default or omission on the part of the council of any municipality or of any of its officers in the construction of the drainage work or in carrying out the provisions of this Act, the referee or Court may direct that the whole or any part of such damages and costs shall be borne by such municipality and be payable out of the general funds thereof.

(3) Where in any such proceedings by or against a municipality an amicable settlement is arrived at and carried out by the advice of counsel, the damages and costs payable under the terms of such settlement by any municipality shall be borne and paid as directed by the referee on application to him on behalf of the council of the municipality or any owner of lands assessed for the construction or maintenance of the drainage work, and in making such direction the referee shall have regard to the provisions of the next preceding sub-section. 57 V. c. 56, s. 97.

McCulloch vs. Caledonia, 1 C. & S. 340, 2 C. & S. 1; Augusta vs. Oxford, 1 C. & S. 345; Elma vs. Ellice, 2 C. & S. 259.

#### *Proceeding with Reference.*

**96.**—(1) The referee at any time after an appeal or reference is made to him as hereinbefore provided, may give directions for the filing or serving of objections and defences to

Referee to direct procedure.

such appeal or reference and for the production of documents and otherwise, and may give an appointment to either or any party to the appeal or reference, to proceed therewith at such place and time and in such manner as to him may seem proper, but the hearing shall be in the county or one of the counties in which the drainage work or proposed drainage work is situate or in which lands are assessed.

**Clerk of court.** (2) The clerk of the county court shall be the clerk of the court of the referee, and shall take charge of and file all the exhibits and shall be entitled to the same fees for filings and for his services and for certified copies of decisions or reports as for similar services in the county court; which fees shall be paid in money and not by stamps.

**Referee's clerk.** (3) In the absence of the clerk of the county court the referee may appoint the referee's clerk or some other person to act as deputy clerk of the county court for the purpose of the trial and for taking charge of and filing all exhibits, and the person so appointed shall, while so acting, have the same power and have and be entitled to the same fees as the clerk of the county court would have and be entitled to if personally present.

**Subpoenas.** (4) County court subpoenas for the attendance of witnesses at the hearing, tested in the name of the referee, may be issued by the clerk of the county court of the county in which the case is to be heard. 57 V. c. 56, s. 95.

**When referee proceeds on view or special knowledge.** 97. When the referee proceeds partly on view or on any special knowledge or skill possessed by himself, he shall put in writing a statement of the same sufficiently full to allow the Court of Appeal to form a judgment of the weight which should be given thereto, and he shall state as part of his reasons the effect by him given to such statement. 57 V. c. 56, s. 96.

McKim vs. East Luther, 2 C. & S. 229.

**Shorthand writer.**

98. A shorthand writer may from time to time be appointed by the Lieutenant-Governor in Council to report hearings or trials before the referee, and every such officer shall

be deemed to be an officer of the High Court, and shall be paid in the same manner as shorthand writers in the High Court are paid and the several sections of the Judicature Act respecting shorthand writers shall apply to any shorthand writer appointed under this Act. 57 V. c. 56, s. 98. Rev. Stat. c. 51.

99. The decision or report of the referee on appeals from assessment or on claims for damages or compensation under section 93 with the evidence, exhibits, the statement (if any) of inspection or of technical knowledge and the reason for his decision shall be filed in the office of the clerk of the county court aforesaid, and notice of the filing shall forthwith be given by the clerk, by post or otherwise, to the solicitors of the parties appearing by solicitor, and to other parties not represented by a solicitor, and also to the clerk of the municipality or other corporation. 57 V. c. 56, s. 99. Clerk of court to forward notice of filing report, etc., to parties.

100. A copy of the decision or report certified by the referee or clerk aforesaid, shall be sent or delivered to the clerk of every municipality interested in the drainage work in question upon receipt of the sum chargeable therefor, as hereinbefore provided, and shall be kept on file as a public document of the municipality. 57 V. c. 56, s. 100. Report to be sent to clerk of each municipality interested.

101. The decision of the referee in all cases other than appeals from assessment or on claims for damages or compensation under section 93 of this Act, shall be in the form of an order for judgment and may be delivered as decisions by the judges of the Supreme Court of Judicature are, and need not be in the form of a report, and unless appealed from to the Court of Appeal, as herein provided, judgment may be entered in the proper office without any further or other application or order. 57 V. c. 56, s. 101. Decision to be in form of order for judgment.

102. When an appointment is given by the referee for the hearing of any matter of reference under this Act in any city, town or place wherein a court house is situated, he shall have in all respects the same authority as a judge of the High Use of court house.



Court in regard to the use of the court house, or other place or apartments set apart in the county for the administration of justice. 57 V. c. 56, s. 102.

Sheriffs, etc.,  
to assist  
referee—fees  
therefor.

**103.** Sheriffs, deputy-sheriffs, constables and other peace officers shall aid, assist and obey the referee in the exercise of the jurisdiction conferred by this Act whenever required so to do, and shall upon the certificate of the said referee, be paid by the county or counties interested, like fees as for similar services at the sittings of the High Court for the trial of causes. 57 V. c. 56, s. 103.

Rules and  
practice.

**104.** Except as in this Act otherwise provided and subject to the provisions thereof, the rules and practice for the time being of the High Court of Justice shall be followed so far as the same are applicable. 57 V. c. 56, s. 104.

Evidence  
taken before  
referee need  
not be filed or  
written out.

**105.** In cases brought before the referee in pursuance of the powers conferred by this Act, or by any other Act, the evidence taken before him need not be filed, and need only be written out at length by the shorthand writer, if required by the referee or by any parties to the reference; and if required by any of the parties to the reference, copies shall be furnished upon such terms as may be fixed by the Lieutenant-Governor in Council. 58 V. c. 55, s. 3.

Taxation of  
costs

**106.** Costs shall be taxed by the referee; or he may direct the taxation thereof by the clerk of the county court with whom the papers are filed, or by any taxing officer of the High Court. 57 V. c. 56, s. 110.

*Crooks vs. Ellice, Hiles vs. Ellice, 2 C. & S. 323.*

Fees, how  
payable.

**107.** Fees shall be paid in stamps or otherwise in the same manner as in the case of other proceedings in the said courts respectively, until other provision is made in that behalf by competent authority. 57 V. c. 56, s. 111.

Referee's fees.

**108.** To provide a fund for or towards the payment of the referee's salary and other expenses, there shall be further payable a sum which shall be determined by the referee and men-

tioned in his decision or report or in a subsequent report, the said sum not to exceed the rate of four dollars a day for every full day the trial occupies, and shall be paid in stamps by one or the other of the parties, or distributed between or among the parties as the referee directs. 57 V. c. 56, s. 112.

109. The decision or report of the referee shall not be given out until stamped with the necessary stamps. 57 V. c. 56, s. 113. Reports to be stamped.

110. The decision or report of the referee, on any appeal or reference under this Act, or on a reference under sections 28 or 29 of the Arbitration Act or in any action or proceeding transferred or referred to him under this Act, shall be binding and conclusive upon all parties thereto, unless appealed from to the Court of Appeal within one month after the filing thereof, or within such further time as the referee or the Court of Appeal or a judge thereof may allow, save as otherwise provided by this Act in any case where it is declared that the decision of the referee shall be final. The decision or report may be appealed against to the Court of Appeal in the same manner as from a decision of a judge of the High Court sitting in Court. 57 V. c. 56, s. 106; 60 V. c. 3, s. 3. Time for appealing to Court of Appeal.

*Rules and Tariff of Costs.*

111. The judges of the Supreme Court shall have the same authority to make general rules with respect to proceedings before the referee and appeals from him as they have with respect to proceedings under the Judicature Act, and sections 122 to 125 of the Judicature Act shall apply thereto. 57 V. c. 56, s. 107. Judges of Supreme Court may make rules.

112.—(1) Subject to any such general rules, the referee shall have power, with the approval of the Lieutenant-Governor in Council, to frame rules regulating the practice and procedure to be followed in all proceedings before him under this Act, and also to frame tariffs of fees in cases not governed by the county court tariff. Referee may make rules.

(2) Such rules and tariffs, whether made by the judges or the referee, shall be published in the "Ontario Gazette" and shall thereupon have the force of law; and the same shall be laid before the Legislative Assembly at its next session after promulgation thereof. 57 V. c. 56, s. 108.

Tariff of  
County Court  
adopted  
until rules  
made.

113. Until other provisions are made under the last two preceding sections the tariff of the county court shall be the tariff of costs and of fees and disbursements for solicitors and officers under this Act, and the referee shall have the powers of a county judge with respect to counsel fees, and may also allow further counsel fees in case of a trial occupying more days than one. 57 V. c. 56, s. 109.

Crooks vs. Ellice, Hiles vs. Ellice, 2 C. & S. 323; Fewster vs. Raleigh, 2 C. & S. 325; McCulloch vs. Calédonia, 2 C. & S. 326; Moke vs. Osnabruck, 2 C. & S. 328; Re Metcalfe and Adelaide and Warwick, Re Colchester North and Gosfield North, 2 C. & S. 334.

#### *Repealing Clause.*

Repeal of in-  
consistent  
provisions.

114. All parts of Acts inconsistent with this Act are hereby repealed. 1 Edw. VII. c. 30, s. 6.

### SCHEDULE A.

#### FORM OF PETITION FOR DRAINAGE WORK.

##### *(Section 4.)*

The petition of the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners), as shown by the last revised assessment roll of the township of \_\_\_\_\_ in the county of \_\_\_\_\_ to be the owners of the lands to be benefited within said township, and hereinafter described, sheweth as follows:

Your petitioners request that the area of land within the said township and being described as follows: That is to say, lots numbered 1 to 10 inclusive in the first concession; lots lettered A to H inclusive in the second concession; north-west halves of lots numbered 4 to 12 inclusive in the third concession; the side road between lots numbered 7 and 8 in the first concession, and the road allowance between concessions

1 and 2 and between 2 and 3 (as the case may be, or describing the area by metes and bounds), may be drained by means of:

1. A drain or drains.
2. Deepening, straightening, widening, clearing of obstructions or otherwise improving the stream, creek or water-course, known as (name or other general designation).
3. Lowering the water of lake                      or the pond known as (name or other general designation), (or by any or all of said means.)

And your petitioners will ever pray. 57 V. c. 56, s. 4.

### SCHEDULE B.

#### FORM OF BY-LAW.

(Section 20.)

A by-law to provide for drainage work in the                      of                      in the county of                      , and for borrowing on the credit of the municipality, the sum of                      , for completing the same (or the sum of                      the proportion to be contributed by said municipality for completing the same).

Provisionally adopted the                      day of                      A.D. 189.

Whereas the majority in number of the resident and non-resident owners (exclusive of farmers' sons not actual owners), as shown by the last revised assessment roll, of the property hereinafter set forth to be benefited by drainage work (as the case may be) have petitioned the council of the said                      of                      , praying that (here set out the purport of the petition, describing generally the lands and roads to be benefited).

And whereas, thereupon the said council has procured an examination, to be made by                      , being a person competent for such purpose, of the said area proposed to be drained and the means suggested for the drainage thereof, and of all other lands and roads liable to assessment under the Municipal Drainage Act, and has also procured plans, specifications and estimates of the drainage work to be made by the said                      and an assessment to be made by him of the lands and roads to be

benefited by such drainage work, and of other lands and roads liable for contribution thereto, stating as nearly as he can the proportion of benefit, outlet liability and injuring liability, which in his opinion will be derived or incurred in consequence of such drainage work by every road and lot, or portion of lot, the said assessment so made being the assessment hereinafter by this by-law enacted to be assessed and levied upon the roads and lots, or parts of lots hereinafter in that behalf specially set forth and described; and the report of the said            in respect thereof, and of the said drainage work being as follows: (*here set out the report of the engineer or surveyor employed*).

And whereas the said council are of opinion that the drainage of the area described is desirable:—

Therefore the said municipal council of the said of           , pursuant to the provisions of the Municipal Drainage Act, 1894, enacts as follows:—

1st. The said report, plans, specifications, assessments and estimates are hereby adopted, and the drainage work as therein indicated and set forth shall be made and constructed in accordance therewith.

2nd. The reeve (*or mayor*) of the said            may borrow on the credit of the corporation of the said            of            the sum of            dollars, being the funds necessary for the work *not otherwise provided for* (*or being said municipality's proportion of the funds necessary for the work*), and may issue debentures of the corporation to that amount in sums of not less than \$50 each, and payable within            years from the date thereof, with interest at the rate of            per centum per annum, that is to say: (*insert the manner of payment annually and whether with or without coupons, and if the latter, omit the last clause of this paragraph*) such debentures to be payable at           , and to have attached to them coupons for the payment of interest.

3rd. For paying the sum of \$410, the amount charged against the said lands and roads for benefit, and the sum of \$108, the amount charged against said lands and roads for outlet liability, and the sum of \$135, the amount charged

**SCHEDULE.**

**599**

against said lands and roads for injuring liability, apart from lands and roads belonging to or controlled by the municipality, and for covering interest thereon for years, at the rate of        per centum per annum, the following total special rates over and above all other rates shall be assessed, levied and collected (in the same manner and at the same time as other taxes are levied and collected) upon and from the undermentioned lots and parts of lots and roads, and the amount of the said total special rates and interest against each lot or part of lot respectively shall be divided into        equal parts, and one such part shall be assessed, levied and collected as aforesaid, in each year, for        years, after the final passing of this by-law, during which the said debentures have to run.

| Concession.                            | Lot or part of lot.  | Acres. | Value of benefit. | Value of outlet liability. | Value of injuring liability. | To cover interest for years at per cent. | Total special rate. | Annual Assessment during each year for years. |
|--|----------------------|--------|-------------------|----------------------------|------------------------------|--|---------------------|---|
|  |                      |        | \$ c.             | \$ c.                      | \$ c.                        | \$ c.                                    | \$ c.               | \$ c.   |
| 10                                     | 5                    | 200    | 100 00            | 23 00                      |                              |  |                     |   |
| 10                                     | S. 1/4 6             | 100    | 50 00             | 10 00                      |                              |  |                     |   |
| 10                                     | N. 1/4 6             | 50     | 30 00             | 5 00                       |                              |  |                     |   |
| 10                                     | S. W. 1/4 8          | 100    | 80 00             | 13 00                      |                              |  |                     |   |
| 10                                     | S. W. 1/4 & N. 1/4 9 | 150    | 150 00            | 20 00                      |                              |  |                     |   |
| 10                                     | 4                    | 200    | .....             | 24 00                      |                              |  |                     |   |
| 10                                     | S. 1/4 3             | 100    | .....             | 13 00                      |                              |  |                     |   |
| 9                                      | W. 1/4 5             | 100    | .....             | .....                      | 40 00                        |  |                     |   |
| 9                                      | N. 1/4 6             | 50     | .....             | .....                      | 25 00                        |  |                     |   |
| 9                                      | N. E. 1/4 & N. 1/4 7 | 150    | .....             | .....                      | 70 00                        |  |                     |   |
| Total for benefit.....                 |                      |        | 410 00            | 108 00                     | 135 00                       |  |                     |   |
| " outlet.....                          |                      |        | 108 00            |                            |                              |  |                     |   |
| " injuring.....                        |                      |        | 135 00            |                            |                              |  |                     |   |
| Roads (and lands) of municipality..... |                      |        | 100 00            |                            |                              |  |                     |   |
| Total .....                            |                      |        | \$753 00          |                            |                              |  |                     |   |

## CONSTRUCTION OF DRAINS.

4th. For paying the sum of (\$100), the amount assessed against the said roads and lands of the municipality, and for covering interest thereon for        years at the rate of        per centum per annum, a special rate on the dollar, sufficient to produce the required yearly amount therefor, shall, over and above all other rates, be levied and collected (in the same manner and at the same time as taxes are levied and collected) upon and from the whole ratable property in the said        of        in each year for        years, after the final passing of this by-law, during which the said debentures have to run.

5th. This by-law shall be published once in every week for four consecutive weeks in the        , newspaper, published in the town of        (*or printed and served or mailed as described*), and shall come into force upon and after the final passing thereof, and may be cited "the        By-law."  
57 V: c. 56, s. 20.

## THE DITCHES AND WATERCOURSES ACT.

*R.S.O. Cap. 285 (1897), as amended up to and including the year 1902.*

|  |   |
|--|---|
| SHORT TITLE, s. 1.   | APPEALS, ss. 22, 25, 26.  |
| APPLICATION OF ACT, s. 2.  | DEFECTS IN AWARDS, ss. 24.  |
| INTERPRETATION, s. 3.  | COLLECTION OF COSTS FROM OWNERS, s. 27.                                 |
| APPOINTMENT OF ENGINEER, s. 4.   | COMPLETION OF WORK ON OWNERS' DEFAULT, s. 28-31.                        |
| LIMIT OF WORK AND COST, s. 5.  | OWNERS USING DITCH AFTER CONSTRUCTION, s. 32.                           |
| LANDS SUBJECT TO ACT, s. 6.  | ACT TO APPLY TO DEEPENING AND WIDENING DITCHES, s. 33.                  |
| MODE OF PROCEEDING, ss. 7.   | MAINTENANCE OF DITCHES HERETOFORE OR HEREAFTER CONSTRUCTED, ss. 34, 35. |
| Declaration of ownership, s. 7.  | RECONSIDERATION OF AWARD, s. 36.  |
| Notice to owners affected, s. 8.   | PENALTY, ENGINEER FAILING TO INSPECT, s. 37.                            |
| Where agreement by owners, ss. 9-12.   | MANDAMUS PROCEEDINGS NOT TO LIE, s. 38.                                 |
| Where no agreement, appointment of Engineer and examination by him, ss. 13-17. | FORMS, s. 39.   |
| Award by Engineer, s. 18.  |   |
| Powers of Engineer, s. 19.   |   |
| WHERE LANDS OR ROADS ARE IN ADJOINING MUNICIPALITIES, ss. 20.                  |   |
| CULVERTS, ETC., ON RAILWAY LANDS, s. 21.                                       |   |

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Ditches and Water-courses Act.*" 57 V. c. 55, s. 1. Short title.
2. This Act shall not affect the Acts relating to municipal or government drainage work. 57 V. c. 55, s. 2. Certain Acts not affected.
3. Where the words following occur in this Act they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:—  
"Interpretation."

"Engineer" shall mean Civil Engineer, Ontario Land Surveyor, or such person as any municipality may deem competent and appoint to carry out the provisions of this Act.



"Judge."

"Judge" shall mean the senior, junior or acting judge of the county court of the county in which the lands are situated in respect of which the proceedings under this Act are taken.

"Owner,"  
meaning of

An owner shall mean and include the owner or possessor of any real or substantial interest in lands whether held in fee simple, fee tail, for one or more life or lives, or for a term of years not less than ten, a lessee for a term of not less than five years with an option to purchase, the executor or executors of an owner, the guardian of an infant owner, any person entitled to sell and convey the land, an agent under a general power of attorney authorizing the appointee to manage and lease the lands, and a municipal corporation as regards any highways or other lands under its jurisdiction. 62 V. (2) c. 28, s. 1.

York vs. Osgoode, 2 C. & S. 416, 432, 440; Logan vs. McKillop, 2 C. & S. 475, 499; In re McLellan and Chinguacousy, 2 C. & S. 534.

"Clear days."

"Clear days" shall mean exclusive of the first and last days of any number of days prescribed.

"Ditch."

"Ditch" shall mean and include a drain open or covered wholly or in part and whether in the channel of a natural stream, creek or watercourse, or not, and also the work and material necessary for bridges, culverts catch-basins and guards.

"Non resident."

"Non-resident" shall mean a person who does not reside within the municipality in which his lands, affected by proceedings under this Act, are situate.

"Maintenance."

"Maintenance" shall mean and include the preservation of a ditch and keeping it in repair.

"Construction."

"Construction" shall mean the original opening or making of a ditch by artificial means.

"Written writing."

"Written," "writing," or terms of like import shall include words printed, engraved, lithographed, or otherwise traced or copied. 57 V. c. 55, s. 3.

Appointment  
of engineer.

4.—(1) Every municipal council shall name and appoint by by-law (Form A) one person to be the engineer to carry out the provisions of this Act, and such engineer shall be and continue an officer of such corporation until his appointment

is revoked by by-law (of which he shall have notice) and another engineer is appointed in his stead, who shall have authority to commence proceedings under this Act or to continue such work as may have been already undertaken.

(2) The council of every municipality shall, by by-law, provide for the payment to the clerk of the municipality of a fair and reasonable remuneration for services performed by him in carrying out the provisions of this Act, and the council shall also, by by-law, fix the charges to be made by the engineer of the municipality for services performed by him under this Act. Fees of clerk and engineer.

(3) Every engineer appointed by a municipal council under this section shall, before entering upon his duties, take and subscribe the following oath (or affirmation) and shall file the same with the clerk of the municipality:— Oath of engineer.

In the matter of *The Ditches and Watercourses Act*.

I (name in full) of the town of \_\_\_\_\_ in the county of \_\_\_\_\_, engineer (or surveyor), make oath and say, (or do solemnly declare and affirm), that I will to the best of my skill, knowledge, judgment and ability, honestly and faithfully, and without fear of, favour to, or prejudice against any owner or owners, perform the duties from time to time assigned to me in connection with any work under The Ditches and Watercourses Act, and make a true and just award thereon.

Sworn (or solemnly declared and affirmed) }  
before me at the \_\_\_\_\_ of \_\_\_\_\_  
in the county of \_\_\_\_\_ this \_\_\_\_\_  
day of \_\_\_\_\_ A.D. \_\_\_\_\_ }

A Commissioner, etc., (or Township Clerk, or J. P.)

—57 V. c. 55, s. 4.

*Turtle vs. Euphemia*, 2 C. & S. 513.

5.—(1) Every ditch to be constructed under this Act shall be continued to a sufficient outlet, but shall not pass <sup>Limit of work.</sup> through or into more than seven original township lots, exclusive of any part thereof on or across any road allowance, unless the council of any municipality upon the petition of a majority of the owners of all the lands to be affected by the

ditch passes a resolution authorizing the extension thereof through or into any other lots within such municipality, and upon the passing of such resolution the proposed ditch may be extended in pursuance of such resolution, but subject always to the provision of sub-section 2 of this section. 57 V. c. 55, s. 5 (1); 59 V. c. 67, s. 1.

**Limit of cost.**

(2) No ditch, the whole cost whereof according to the estimate of the engineer or the agreement of the parties will exceed \$1,000, shall be constructed under the provisions of this Act. 57 V. c. 55, s. 5 (2).

**What lands to be liable for construction.**

6.—(1) The lands, the owners of which may be made liable for the construction of a ditch under this Act, shall be those lying within a distance of seventy-five rods from the sides and point of commencement of the ditch, but the lands through or into which the ditch does not pass and which lands also adjoin any road allowance traversed by the ditch, shall not be liable except when directly benefited and then only for the direct benefit.

(2) Provided nevertheless that the council of any county lying east of the county of Frontenac may pass a by-law declaring that within said county the lands lying within a distance of one hundred rods from the sides and point of commencement of the ditch may be made liable, instead of seventy-five rods, as mentioned in sub-section 1 of this section. 57 V. c. 55, s. 6.

**Declaration of ownership.**

7. (1) Any owner other than the municipality shall, before commencing proceedings under this Act, file with the clerk of the municipality in which the parcel of land requiring the ditch is situate, a declaration of ownership thereof (Form B) which may be taken before a justice of the peace, a commissioner for taking affidavits, or the clerk of the municipality. 57 V. c. 55, s. 7.

(2) In case of omission to file such declaration through inadvertence or mistake at the time aforesaid, the Judge may in case of such ownership at said time permit the same to be filed at any stage of the proceedings upon such terms and conditions as he may impose or direct. 58 V. c. 54, s. 1.

"Where a declaration of ownership has been filed under the provisions of The Ditches and Watercourses Act, such declaration shall be conclusive as conferring jurisdiction to proceed, unless appealed against to the county Judge under the provisions of the said Act, but this amendment shall not affect any pending litigation nor shall it be regarded as implying that the proper construction of the said statute was or is otherwise than as herein in this section declared." 62 V. (2) c. 28, s. 7.

Declaration of ownerships conclusive as to conferring jurisdiction under Rev. Stat., c. 285.

York vs. Osgoode, 2 C. & S. 416, 432, 440; Logan vs. McKillop, 2 C. & S. 475, 499; Turtle vs. Euphemia, 2 C. & S. 513.

8. The owner of any parcel of land who requires the construction of a ditch thereon shall, before filing with the clerk of the municipality the requisition provided for by section 13 of this Act, serve upon the owners or occupants of the other lands to be affected a notice in writing (Form C) signed by him and naming therein a day and hour and also a place convenient to the site of the ditch at which all the owners are to meet and estimate the cost of the ditch, and agree, if possible, upon the apportionment of the work, and supply of material for construction among the several owners according to their respective interests therein, and settle the proportions in which the ditch shall be maintained, and the notices shall be served not less than twelve clear days before the time named therein for meeting. 57 V. c. 55, s. 8.

Notice to other owners affected.

Logan vs. McKillop, 2 C. & S. 475, 490.

9.—(1) If an agreement is arrived at by the owners, as in the next preceding section is provided, it shall be reduced to writing (Form D), and signed by all the owners, and shall within six days after the signing thereof be filed with the clerk of the municipality in which the parcel of land the owner of which requires the ditch is situate; but if the lands affected lie in two or more municipalities the agreement shall be in as many numbers as there are municipalities and filed as aforesaid with their respective clerks; and the agreement may be enforced in the like manner as an award of the engineer as hereinafter provided.

Form of agreement-filing.

(2) It shall be the duty of the municipality to keep printed copies of all the forms required by this Act. 57 V. c. 55, s. 9.

Informalities  
not to invali-  
date pro-  
ceedings.

10. No proceedings taken or agreement made and entered into under the provisions of sections 8 and 9 of this Act shall in any case for want of strict compliance with such provisions be void or invalidate any subsequent proceedings under this Act, provided the notices required by section 8 of this Act have been duly served, and any such agreement may with the consent in writing of the parties thereto (which consent shall be filed in the same manner as the agreement), or by order of any court, or of the judge on an appeal under this Act, be amended so as to cause the same to conform to the provisions of this Act. 57 V. c. 55, s. 10.

Adjourning  
meeting for  
purpose of  
adding par-  
ties.

11. If at or before the meeting of owners provided for in section 9 of this Act, it appears that any notice required by section 8 has not been served, or has not been served in time, or duly served, the owners present at such meeting may adjourn the same to some subsequent day in order to allow the necessary notices to be duly served, and such adjourned meeting shall, if such notices have been given and served as provided by section 8, be a sufficient compliance with the provisions of this Act. 57 V. c. 55, s. 11.

Reeve to sign  
on behalf of  
municipality  
interested.

12. The reeve or other head of the municipal council of any municipality shall have power on behalf of the municipal council thereof to sign the agreement aforesaid, and his signature shall be binding upon the corporation. 57 V. c. 55, s. 12.

Requisition  
for appoint-  
ment by engi-  
neer when no  
agreement  
arrived at.

13. In case an agreement as aforesaid is not arrived at by the owners at the said meeting or within five days thereafter, then the owner requiring the ditch may file with the clerk of the municipality in which such parcel is situate, a requisition (Form E), naming therein all the several parcels of land that will be affected by the ditch and the respective owners thereof, and requesting that the engineer appointed by the municipality under this Act be asked to appoint a time and place in

the locality of the proposed ditch at which the said engineer will attend to make an examination as hereinafter provided. 57 V. c. 55, s. 13.

14. The clerk, upon receiving the requisition, shall forthwith enclose a copy thereof in a registered letter to the engineer; and on the receipt of the same by the engineer he shall notify the clerk in writing, appointing a time and place at which he will attend in answer to the requisition, which time shall be not less than ten and not more than sixteen clear days from the day on which he received the copy of the requisition; and on the receipt of the notice of appointment from the engineer the clerk shall file the same with the requisition and shall forthwith send, by registered letter, a copy of the notice of appointment to the owner making the requisition, who shall, at least four clear days before the time so appointed, serve upon the other owners named in the requisition a notice (Form F), requiring their attendance at the time and place fixed by the engineer, and shall, after serving such notice, endorse on one copy thereof the time and manner of service and leave the same with the endorsements thereon with the engineer not later than the day before the time fixed in the notice of appointment. 57 V. c. 55, s. 14.

Notice to engineer and notice of appointment made by engineer.

*Dagenais vs. Trenton*, 2 C. & S. 445.

15.—(1) Notices under the provisions of this Act shall be served personally, or by leaving the same at the place of abode of the owner or occupant, with a grown up person residing thereat, and in case of non-residents, then upon the agent of the owner, or by registered letter addressed to the owner at the post office nearest to his last known place of residence, and where that is not known, he may be served in such manner as the judge may direct.

Mode of serving notices.

(2) Any occupant not the owner of the land, notified in the manner provided by this Act, shall immediately notify the owner thereof, and shall, if he neglects to do so, be liable for all damages suffered by such owner by reason of such neglect. 57 V. c. 55, s. 15.

Occupant to notify owner.

Examination  
by engineer.

16.—(1) The engineer shall attend at the time and place appointed by him in answer to the requisition, and shall examine the locality, and if he deems it proper, or if requested by any of the owners, may examine the owners and their witnesses present, and take their evidence, and may administer an oath or affirmation to any owner or witness examined by him. If upon examining the locality the engineer is of opinion that the lands of owners upon whom notice has not been served will be affected by the ditch, he shall direct that the notice required by section 14 shall be served on such owners by the owner making the requisition and shall adjourn the proceedings to the day named in the notice for continuing the same for the purpose of allowing such owners to be present and to be heard upon the examination and taking of evidence.

(2) The engineer may adjourn his examination and the hearing of evidence from time to time, and if he finds that the ditch is required he shall, within thirty days after his first attendance make his award in writing (Form G), specifying clearly the location, description and course of the ditch, its commencement and termination, apportioning the work and the furnishing of material among the lands affected and the owners thereof, according to his estimate of their respective interests in the ditch, fixing the time for performance by the respective owners, apportioning the maintenance of the ditch among all or any of the owners, so that as far as practicable each owner shall maintain the portion on his own land; and stating the amount of his fees and the other charges and by whom the same shall be paid.

*Murray vs. Dawson*, 2 C. & S. 395; *Dawson vs. Murray*, 2 C. & S. 400.

(3) In any case where a ditch is to be covered, the engineer shall in his award specify the kind of material to be used in the covered portion of such ditch. 57 V. c. 55, s. 16.

Engineer may  
order opening  
of ditch across  
land of a per-  
son not bene-  
fited.

17. Should the engineer be of the opinion that the land of any owner will not be sufficiently affected by the construction of the ditch to make him liable to perform any part thereof, and that it is necessary or not, as the case may be, to construct the ditch across or into his land, he may, by his award, relieve

such owner from performing any part of the work of the ditch and place its construction on the other owners; and any person carrying out the provisions of the award upon the land of the owner so relieved shall not be considered a trespasser while causing no unnecessary damage, and he shall replace any fences opened or removed by him. 57 V. c. 55, s. 17.

18. The engineer shall forthwith, after making his award as hereinbefore provided, file the same, and any plan, profile or specifications of the ditch, with the clerk of the municipality in which the land requiring the ditch is situate, but should the lands affected lie in two or more municipalities, the award and any plan, profile or specifications shall be filed by the engineer with the clerk of each municipality, and may be given in evidence in any legal proceedings by certified copy, as are other official documents; and the clerk of the municipality, or of each of the municipalities shall forthwith upon the filing of the award, notify each of the persons affected thereby within the municipality of which he is clerk, by registered letter or personal service, of the filing of the same, and the portion of work to be done and material furnished by the person notified as shown by the award, and the clerk shall keep a book in which he shall record the names of the parties to whom he has sent notice, the address to which the same was sent and the date upon which the same was deposited in the post office or personally served. 57 V. c. 55, s. 18.

Filing award, notice to persons affected.

19. If the lands affected by the ditch are situate in two or more municipalities, the engineer of the municipality in which proceedings were commenced shall have full power and authority to continue the ditch into or through so much of the lands in any other municipality as may be found necessary, but within the limit of length as hereinbefore provided, and all proceedings authorized under the provisions of this Act shall be taken and carried on in the municipality where commenced. 57 V. c. 55, s. 19.

Powers of engineer of municipality in which proceedings commenced.

20. In every case where lands or roads in two or more municipalities are affected the clerk of the municipality in

Certificates relating to lands or roads in adjoining municipalities



which proceedings were commenced shall forward to the clerk of each of the other municipalities a certified copy of every certificate affecting or relating to lands or roads therein respectively, and the municipal council thereof shall pay the sum for which lands and roads within its limits are liable to the treasurer of the municipality in which proceedings were commenced, and unless the amounts are paid within fourteen days after demand in writing by the parties declared by the certificate liable to pay the same, such council shall have power to take all proceedings for the collection of the sums so certified to be paid, as though all the proceedings had been taken and carried on within its own limits. 57 V. c. 55, s. 20.

Culverts, etc.,  
on railway  
lands.

**21.—(1)** The council of any municipality may enter into an agreement with any railway company for the construction or enlargement by the railway company of any ditch or culvert on the lands of such railway company, and for the payment of the cost of such work after completion out of the general funds of the municipality, and the council shall have power to assess and levy the amount so paid exclusive of any part thereof for which the municipality may be liable under the award, as to the cost of the work in the same manner as taxes are levied upon the lands mentioned in the award and in the relative proportions of the estimated cost of the work to be done and materials furnished by the respective owners in the construction of such ditch; and such assessment shall in every case be determined by a supplementary award made by the engineer, and subject to appeal to the judge in the same manner as other awards made under this Act.

(2) No agreement with a railway company shall be entered into by a municipal council under this section which will impose a special liability on the owners without the consent in writing, filed with the clerk of the municipality, of two-thirds of the owners liable for the construction of the ditch in respect to which such work on railway lands is to be undertaken.

(3) The cost of any such work on railway lands shall be exclusive of the sum fixed as the limit of the cost of the work imposed by section 5 of this Act. 57 V. c. 55, s. 21.

22.—(1) Any owner dissatisfied with the award of the engineer, and affected thereby, may, within fifteen clear days from the filing thereof, appeal therefrom to the judge, and the proceedings on the appeal shall be as hereinafter provided. Appeals from award to county judge.

(2) The appellants shall serve upon the clerk of the municipality in which proceedings for the ditch were initiated, a notice in writing of his intention to appeal from the award, shortly setting forth therein the grounds of appeal. Notice of appeal.

(3) The clerk, in the next preceding sub-section mentioned shall, after the expiration of the time for appeal, forward by registered letter or deliver a copy of the notice or notices of appeal and a certified copy of the award, and also the plans and specifications (if any) to the judge, who shall forthwith upon the receipt of the registered letter, or documents aforesaid, notify the clerk of the time he appoints for the hearing thereof, and shall fix the place of hearing at the town hall or other place of meeting of the council of the municipality in which proceedings for the ditch were initiated, unless the judge for the greater convenience of the parties and to save expense fixes some other place for the hearing. The judge may if he thinks proper order such sum of money to be paid by the appellant or appellants to the said clerk as will be a sufficient indemnity against costs of the appeal; and the clerk upon receiving notice from the judge, shall forthwith notify the engineer whose award is appealed against, and all parties interested, in the manner provided for the service of notices under this Act. Clerk to notify judge and judge to fix time and place for hearing.

(4) Any appellant may have the lands and premises inspected by any other engineer or person who, for such purposes, may enter upon such lands and premises, but shall do no unnecessary damage. Inspection of premises by another engineer.

(5) The clerk of the municipality to whom notice of appeal is given shall be the clerk of the court, and shall record the proceedings. Clerk of the court

(6) It shall be the duty of the judge to hear and determine the appeal or appeals within two months after receiving notice thereof from the clerk of the municipality as hereinbefore provided. Judge to hear and determine within two months.

Or within such further period as the Judge on hearing the parties may decide to be necessary in order to allow proper inspection of the premises to be made as authorized by the next following sub-section. 1 Edw. VII., c. 12, s. 22.

Re McFarlane vs. Miller et al., 2 C. & S. 451.

Powers of  
judge on  
appeal.

(7) The judge on appeal may set aside, alter, or affirm the award and correct any errors therein; he may examine parties and witnesses on oath, and may inspect the premises and may require the engineer to accompany him; and should the award be affirmed or altered, the costs of appeal shall be in his discretion, but if set aside he shall have power to provide for the payment of the costs in the award mentioned, and also the costs of appeal, and may order the payment thereof by the parties to the award, or any of them, as to him may seem just, and may fix the amount of such costs.

Depriving  
engineer of  
fees when  
guilty of mis-  
conduct.

(8) In case the judge on an appeal finds that the engineer has through partiality or from some other improper motive, knowingly and wilfully favoured unduly any one or more of the parties to the proceedings, he may direct that the engineer be deprived of all fees in respect to the award or of such part thereof as the judge may deem proper. But such order shall not deprive any party to the proceedings of any remedy he may otherwise have against the engineer.

Fees and  
disbursements  
of judge.

(9) The judge shall be entitled to charge for holding court for the trial of appeals under this Act, and for the inspection of the premises, the sum of five dollars a day, which charge shall be considered part of the costs of appeal under the provisions of the next preceding sub-section.

Enforcement  
of award as  
amended.

(10) The award as so altered or affirmed shall be certified by the clerk together with the costs ordered, and by whom to be paid, and shall be enforced in the same manner as the award of the engineer, and the time for the performance of its requirements shall be computed from the date of such judgment in appeal; and the clerk shall immediately after the hearing, send by registered letter, to the clerk of any other municipality in which lands affected by the ditch are situate, a certified copy of the changes made in the award by the judge,

which copy shall be filed with the award, and each clerk shall forthwith by registered letter notify every owner within his municipality of any change made by the judge in the portion of work and material assigned to such owner. 57 V. c. 55, s. 22.

**23.** No award made by an engineer under this Act shall be set aside by the judge for want of form only or on account of want of strict compliance with the provisions of this Act, and the judge shall have power to amend the award or other proceedings, and may in any case refer back the award to the engineer with such directions as may be necessary to carry out the provisions of this Act. 57 V. c. 55, s. 23.

Judge may amend or refer back award.

**24.** Every award made under the provisions of this Act shall after the lapse of the time hereinbefore limited for appeal to the judge; and after the determination of appeals, if any, by him, where the award is affirmed, be valid and binding to all intents and purposes notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act. 57 V. c. 55, s. 24.

When award to be binding notwithstanding defects.

York vs. Osgoode, 2 C. & S. 416, 432, 440; Logan vs. McKillop, 2 C. & S. 475, 499; Turtle vs. Euphemia, 2 C. & S. 513. See 62 V. (2) c. 28, s. 7.

**25.** In all appeals under this Act from the engineer's award the judge shall possess all such powers for compelling the attendance of, and for the examination on oath, of all parties and other persons as belong to or might be exercised by him in the division court or in the county court. 57 V. c. 55, s. 25.

Powers of judge as to taking evidence.

**26.—(1)** Upon any appeal to a judge under this Act, the clerk of the municipality shall have the like powers as the clerk of a division court as to the issuing of subpoenas to witnesses upon the application of any party to the proceedings, or upon an order of the judge for the attendance of any person as a witness before him.

Clerk may issue subpoenas.

Witness fees.

(2) The fees to be allowed to witnesses upon an appeal under this Act shall be upon the scale of fees allowed to witnesses in any action in the division court. 57 V. c. 55, s. 26.

Municipalities to pay costs, etc., and collect same from persons liable.

27. The municipality or each of the municipalities shall within ten days after the expiration of the time for appeal or after appeal, as the case may be, pay to the engineer and judge and all other persons entitled to the same, their charges and fees or a portion thereof awarded or adjudged to be paid by the owners therein, and shall, if the same be not forthwith repaid by the persons awarded or adjudged to pay the same, cause the amount, with seven per cent. added thereto, to be placed upon the collector's roll as a charge against the lands of the person so in default, and the same shall thereupon become a charge upon such lands, and shall be collected in the same manner as municipal taxes. 57 V. c. 55, s. 27.

Letting work on non-compliance with award.

28.—(1) The engineer at the expiration of the time limited by the award for the completion of the ditch, shall inspect the same, and if he finds the ditch or any part thereof not completed in accordance with the award, he may let the work and supply of material to the lowest bidder giving security in favour of the municipality by which he was appointed, and approved by the engineer, for the due performance thereof within a limited time, but no such letting shall take place:—

- (a) Until notice in writing of the intended letting has been posted up, in at least three conspicuous places in the neighbourhood of the place at which the work is to be done, for four clear days.
- (b) And until after four days from the sending of the notice by registered letter, to the last-known address of such persons interested in the said award as do not reside in said municipality or municipalities, as the case may be.

(2) If, however, the engineer is satisfied of the good faith of the person failing in the performance of the award, and there is good reason for the non-performance thereof, he may,

in his discretion, and upon payment of his fees and charges, extend the time for performance. Extension of time for compliance.

(3) Any owner in default, supplying the material and doing the work after proceedings are begun to let the same, shall be liable for the fees and expenses occasioned by his default, and the same shall form a charge on his land, and if not paid by him on notice, the council shall pay the same on the certificate of the engineer, and shall cause the amount with seven per cent. added thereto to be placed on the collector's roll against the lands of the person in default, to be collected in the same manner as municipal taxes. Liability of person in default of doing work after proceedings begun.

(4) The engineer may let the work and supply of material or any part thereof, by the award directed, a second time or oftener, if it becomes necessary in order to secure its performance and completion. 57 V. c. 55, s. 28; 62 V. (2) c. 28, s. 3; 2 Edw. VII. c. 12, s. 26. Power to re-let.

Murray vs. Dawson, 2 C. & S. 395; O'Byrne vs. Campbell, 2 C. & S. 408; Hepburn vs. Orford, 2 C. & S. 411; Dalton vs. Ashfield, 2 C. & S. 455.

29. The engineer shall, within ten days after receipt of notice in writing of the supplying of material and completion of the work let, as in the next preceding section mentioned, inspect the same, and shall if he find the material furnished and the work completed, certify the same in writing (Form H.), stating the name of the contractor, the amount payable to him, the fees and charges which the engineer is entitled to for his services rendered necessary by reason of the non-performance, and by whom the same are to be paid. 57 V. c. 55, s. 29. Certificates of engineer upon completion or work let.

30. The council shall at their meeting next after the filing of the certificate or certificates as in the next preceding section mentioned, pay the sums therein set forth to the persons therein named, and unless the owners within the municipality upon notice pay the sums for which they are thereby made liable, the council shall have power to cause the amount each owner is liable for, together with seven per cent. added thereto, to be placed upon the collector's roll, and the same shall thereupon Payment of amounts named in certificate of engineer.

become a charge against his lands, and shall be collected in the same manner as municipal taxes. 57 V. c. 55, s. 30.

Letting  
contracts for  
rock-cutting  
or blasting.

**31.**—(1) If it appears to the engineer that rock-cutting or blasting is required, the engineer may cause the work of cutting or blasting and removing the rock to be done by letting the same out to public competition by tender or otherwise, instead of requiring each owner benefited to do his share of the work; and the engineer shall, by his award, determine the fractional part of the whole cost which shall be paid by each of the owners benefited, and upon completion of the rock-cutting or blasting and removal, shall certify to the clerk of the municipality by which he was appointed, the total cost thereof including his fees and charges, and the said clerk, and the clerk of any other municipality affected, shall notify all the owners liable to contribute under the award, within their respective municipalities, of the said total cost and the part to be paid by him, and unless forthwith paid, the same with seven per cent. added thereto, shall be placed on the collector's roll of the municipality in which his lands are situate, and the same shall thereupon become a charge against the land of the owners so liable, and shall be collected in the same manner as municipal taxes.

Payment of  
contractor  
and engineer.

(2) It shall be the duty of the municipality in which proceedings for the work were commenced, through the treasurer thereof, to pay the contractor for the rock-cutting or blasting and removal as soon as done to the satisfaction and upon the certificates of the engineer, and also to pay the fees and charges of the engineer in connection therewith. 57 V. c. 55, s. 31.

Owners desir-  
ing to avail  
themselves of  
ditch after  
construction.

**32.** In case any owner during or after the construction of a ditch desires to avail himself of such ditch for the purpose of draining other lands than those contemplated by the original proceedings, he may avail himself of the provisions of this Act, as if he were an owner requiring the construction of a ditch; but no owner shall make use of a ditch after construction, unless under an agreement or award, pursuant to the provisions of this Act. 57 V. c. 55, s. 32.

**33.** This Act shall apply to the deepening, widening or covering of any ditch already or hereafter constructed, and the proceedings to be taken for procuring such deepening, widening or covering, shall be the same as the proceedings to be taken for the construction of a ditch under the provisions of this Act, but in no case shall a ditch be covered, unless when covered it will provide capacity for all the surface and other water from lands and roads draining naturally towards and into it as well as for the water from all the lands made liable for the construction thereof. 57 V. c. 55, s. 33. Deepening, widening or covering ditch.

**34.** The maintenance of any ditch, whether covered or open, constructed, or of any creek or watercourse that has been deepened or widened, under the provisions of any former Act respecting *Ditches and Watercourses*, or constructed, deepened, widened or covered under this Act, shall be performed by the respective owners, in such proportion as is provided in the original or any subsequent award; and the manner of enforcing the same shall be as hereinafter provided. 57 V. c. 55, s. 34. Maintenance of ditches heretofore or hereafter constructed.

**35.—(1)** If any owner whose duty it is to maintain any portion of a ditch, neglects to maintain the same in the manner provided by the award, any of the owners parties to the award whose lands are affected by the ditch, may, in writing, notify the owner making default, to have his portion put in repair within thirty days from the receipt of such notice; and if the repairs are not made and completed within thirty days, the owner giving the notice, may notify the engineer, in writing, to inspect the portion complained of. Enforcing maintenance.

(2) The inspection by the engineer and the proceedings for doing and completing the repairs required and enforcing payment of costs, fees and charges shall be as hereinbefore provided in case of non-completion of the construction of a ditch; but should the engineer find no cause of complaint he shall certify the same with the amount of his fees and charges to the owner who complained and also to the clerk of the municipality, and the owner who made complaint shall pay the



fees and charges of the engineer, and if not forthwith paid by him, the same shall be charged and collected in the same manner as is provided for by this Act, in the case of other certificates of the engineer.

(3) Any owner interested in or affected by any ditch heretofore or hereafter constructed, which has not been constructed under any of the Acts mentioned in section 34 of this Act, nor under this Act, nor under any Act relating to the construction of drainage work by local assessment, may take proceedings for the deepening, widening, extending, covering or repair of such ditch in the same manner as for the construction of a ditch under this Act; provided always that the extent of the work and costs thereof and assessment therefor shall not exceed the limitations imposed by sections 5 and 6 of this Act. 57 V. c. 55, s. 35.

Dalton vs. Ashfield, 2 C. & S. 455.

Reconsideration of agreement or award.

**36.** Any owner party to the award whose lands are affected by a ditch, whether constructed under this Act or any other Act respecting ditches and watercourses, may, at any time after the expiration of two years from the completion of the construction thereof, or in case of a covered drain at any time after the expiration of one year, take proceedings for the reconsideration of the agreement or award under which it was constructed, and in every such case he shall take the same proceedings, and in the same form and manner as are hereinbefore provided in the case of the construction of a ditch.

Proviso.

Provided that in case any ditch, after its construction, proves insufficient for the purposes for which it was constructed so as to cause an overflow of water upon any lands along the said ditch and causes damage to the same, any owner party to the award may at any time after the expiration of six months from the completion of the ditch take proceedings as aforesaid for the reconsideration of the agreement or award under which such ditch was constructed for the purpose of remedying the defect in that particular respect. This proviso shall apply only to that portion of the Province

lying east of the county of Frontenac. 57 V. c. 55, s. 36; 58 V. c. 54, s. 2.

Logan v. McKillop, 2 C. & S. 475, 499.

**37.** Any engineer who wilfully neglects to make any inspection provided for by this Act for thirty days after he has received written notice to inspect, shall be liable to a fine of not less than \$5 and not more than \$10, to be recovered with costs on complaint made before a justice of the peace having jurisdiction in the matter, and in default of payment the same shall be recoverable by distress, and every such fine shall be paid over to the treasurer of the municipality in which the offence arose. 57 V. c. 55, s. 37.

Penalty for engineer failing to inspect.

**38.** No action, suit or other proceeding shall lie or be had or taken for a mandamus or other order to enforce or compel the performance of an award or completion of a ditch made under this Act, but the same shall be enforced in the manner provided for by this Act. 57 V. c. 55, s. 38.

Actions for mandamus, etc., not to lie.

**39.** In carrying into effect the provisions of this Act, the forms set forth in the schedule hereto may be used, and the same or forms to the like effect shall be deemed sufficient for the purposes mentioned in the said schedule. 57 V. c. 55, s. 40.

Use of forms.

“The Ditches and Watercourses Act shall apply to the drainage amongst other lands of lands for mining or manufacturing purposes, so as to enable the owner thereof to take proceedings thereunder, but in such case the engineer in default of agreement shall determine whether the lands of other owners, through which the ditch or drain may pass, shall be called upon to contribute to the construction of the drain, and whether and to what extent the same may require drainage or will be benefited thereby. In the event of his finding that the lands of such other owners do not require drainage, and that the said ditch or drain will not substantially benefit the same, he shall determine what compensation the owner of the lands used for mining or manufacturing purposes shall make for any injury caused to such other owners by reason

Drainage of lands for mining or manufacturing purposes.

of the ditch or drain passing through their lands. but if such lands will be substantially benefited by such drainage, then he shall determine the extent of such benefit, and shall deduct the same from the amount of compensation so to be made, or shall take the proceedings provided for by sub-section (2) of section 16 of the said Act, as the case may require."

(2) Nothing in this section contained shall affect any litigation pending at the time of passing thereof. 62 V. (2) c. 28, s. 2.

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### SCHEDULE.

#### FORM "A."

(Section 4.)

#### BY-LAW FOR APPOINTMENT OF ENGINEER.

A by-law for the appointment of an engineer under *The Ditches and Watercourses Act*.

Finally passed                      189

The municipal council of the                      of                      in the  
county of                      enacts as follows:

1. Pursuant to the provisions of section 4 of *The Ditches and Watercourses Act*,                      (name of person) of the town (or township) of                      in the county of                      is hereby appointed as the engineer for this municipality to carry out the provisions of the said Act.

2. The said engineer shall be paid the following fees for services rendered under the said Act (or as the case may be).

3. This by-law shall take effect from and after the final passing thereof.

Reeve.

Clerk.

[L.S.]

## FORM "B."

(Section 7.)

## .. DECLARATION OF OWNERSHIP.

In the matter of *The Ditches and Watercourses Act*, and of  
a ditch in the township (*or as the case may be*) of  
in the county of

I                      of the                      of                      in the county of  
do solemnly declare and affirm that I am the owner within  
the meaning of *The Ditches and Watercourses Act*, of lot  
(*or the sub-division of the lot, naming it*) number  
in the                      concession of the township of                      , being  
(*describe the nature of ownership*).

Solemnly declared and affirmed

before me at the                      of

in the county of

A.D. 189     .

a Commissioner.

(J. P. or clerk,)

57 V. c. 55, Sched. Form "B."

## FORM "C."

(Section 8.)

NOTICE TO OWNERS OF LANDS AFFECTED BY PROPOSED  
DITCH.

To

Township of                      , (date) 189     .

Sir,

I am within the meaning of *The Ditches and Watercourses Act*, the owner of lot (*or the sub-division, as in the declaration*) number                      in the                      concession of                      , and as such owner I require a ditch to be constructed (*or if for reconsideration of agreement or award to deepen, widen, or otherwise improve the ditch, state the object*) for the draining

of my said land under the said Act. The following other lands will be affected: (*here set out the other parcels of land, lot, concession, and township and the name of the owner in each case; also each road and the municipality controlling it.*)

I hereby request that you, as owner of the said (*state his land*), will attend at (*state place of meeting*), on \_\_\_\_\_, the day of \_\_\_\_\_, 189\_\_\_\_, at the hour of \_\_\_\_\_ o'clock in the noon, with the object of agreeing, if possible, on the respective portions of the work and materials to be done and furnished by the several owners interested and the several portions of the ditch to be maintained by them.

Yours, etc.,

(*Name of owner.*)

57 V. c. 55, Sched. Form "C."

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FORM "D."

(*Section 9.*)

AGREEMENT BY OWNERS.

Township of \_\_\_\_\_ (date) 189\_\_\_\_

Whereas it is found necessary that a ditch should be constructed (*or deepened, or widened, or otherwise improved*) under the provisions of *The Ditches and Watercourses Act*, for the draining of the following lands (and roads if any): (*here describe each parcel and give name of owner as in the notice, including the applicant's own land, lot, concession and township, and also roads and by whom controlled.*)

Therefore we the owners within the meaning of the said Act of the said lands (*and if roads proceed and*

the reeve of the said municipality on behalf of the council thereof) do agree each with the other as follows: That a ditch be constructed (*or as the case may be*), and we do hereby estimate the cost thereof at the sum of \$ \_\_\_\_\_, and the ditch shall be of the following description: (*here give point of commencement, course and termination, its depth, bottom and top width and other particulars as agreed upon, also any bridges, culverts or catch basins, etc., required.*) I owner of (*describe his lands*) agree to (*here*

give *portion of work to be done, or material to be supplied*) and to complete the performance thereof on or before the day of \_\_\_\_\_ A.D., 189 . I \_\_\_\_\_ owner of, etc., (*as above, to the end of the ditch*).

That the ditch when constructed shall be maintained as follows: I \_\_\_\_\_ owner of (*describe his lands*) agree to maintain the portion of ditch from (*fix the point of commencement*) to (*fix the point of termination of his portion*), I, \_\_\_\_\_ owner of (*describe his lands*) agree to maintain, etc., (*as above, to the end of the ditch*).

Signed in presence of \_\_\_\_\_

\_\_\_\_\_ (*Signed by the parties here.*)

57 V. c. 55, Sched. Form "D."

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FORM "E."

(Section 13.)

REQUISITION FOR EXAMINATION BY ENGINEER.

Township of \_\_\_\_\_ (date) 189 .

To (*name of clerk*).

Clerk of \_\_\_\_\_

(*P. O. address*).

SIR,—I am, within the meaning of *The Ditches and Watercourses Act*, the owner of lot (*or sub-division as in the declaration*), numbered \_\_\_\_\_, in the \_\_\_\_\_ concession of \_\_\_\_\_ and as such I require to construct (deepen widen *or otherwise improve as needed*), a ditch under the provisions of the said Act, for the drainage of my said land, and the following lands and roads will be affected: (*here describe each parcel to be affected as in the notice for the meeting to agree and state the name of the owner thereof*), and the said owners having met and failed to agree in regard to the same, I request that the engineer appointed by the municipality for the purposes of the said Act, be asked to appoint a time and place in the locality of the proposed ditch, at which he will attend and examine the premises, here any evidence of the parties and their witnesses, and make his award under the provisions of the said Act.

(*Signature of the party or parties.*)

57 V. c. 55, Sched. Form E.

## THE DITCHES AND WATERCOURSES ACT.

## FORM "F."

(Section 14.)

## NOTICE OF APPOINTMENT FOR EXAMINATION BY ENGINEER.

Township of (date) 189 .

To (*Name of owner*).(*P. O. address*).

SIR,—You are hereby notified that the engineer appointed by the municipality for the purposes of *The Ditches and Watercourses Act*, has, in answer to my requisition, fixed the hour of o'clock in the noon of day, the day of to attend at (*name the place appointed*) and to examine the premises and site of the ditch required by me to be constructed under the provisions of the said Act (*or as the case may be*) and you, as the owner of lands affected, are required to attend, with any witnesses that you may desire to have heard, at the said time and place.

Yours, etc.

(*Signature of applicant*).

57 V. c. 55, Sched. Form F.

## FORM "G."

(Section 16.)

## AWARD OF ENGINEER.

I, the engineer appointed by the municipality of the of in the county of under the provisions of *The Ditches and Watercourses Act*, having been required so to do by the requisition of owner of lot number in the concession of the township of (*describe as in requisition*), filed with the clerk of the said municipality and representing that he requires certain work to be done under the provisions of the said Act for the draining of the said land, and that the following other land (*and roads*) would be affected;—(*here set out the other parcels of lands or roads affected as in the requisition*), did attend at the time and

place named in my notice in answer to said requisition, and having examined the locality (and the parties and their witnesses *if such be the case*) find that the ditch (*or the deepening or widening of a ditch*) is required. The location, description and course of the ditch, and its point of commencement and termination are as follows:—

*(Here describe the ditch as to all above particulars.)*

The said work will affect the following lands:—(*here set forth the other lands and their respective owners.*) I do therefore award and apportion the work and the furnishing of material among the lands affected and the owners thereof according to my estimate of their respective interests in the said work as follows:—

1. (*Name of owner and description of his land*) shall make and complete (*here fix the point of commencement and ending of his portion*) and shall furnish the material (*state what material*) all of which, according to my estimate, will amount in value to \$ \_\_\_\_\_, and I fix the time for the performance of such work, and providing such material on the \_\_\_\_\_ day of \_\_\_\_\_ A.D. 189 \_\_\_\_\_ at furthest.

2. (*Name of owner and description of his land and so on as above to the end.*)

I do further award and apportion the maintenance of the ditch as follows:—

1. (*Name of owner and description of his land*) shall maintain (*here fix the point and commencement and ending of his portion.*)

2. (*Name of owner, etc., as above.*)

My fees and the other charges attendant upon and for making this award are (*here give fees and other charges, including clerk's fees, in detail*) amounting in all to \$ \_\_\_\_\_, which shall be borne and paid as follows:—(*state by whom and by what lands respectively.*)

Dated this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 189 \_\_\_\_\_

Witness,

*(Signature of Engineer.)*

57 V. c. 55, Sched. Form G.



## FORM "H."

(Section 29.)

## CERTIFICATE OF ENGINEER

To

Clerk of the                      of

I hereby certify that                      has furnished the material and completed the work (*as the case may be*) which under my award made in accordance with the provisions of *The Ditches and Watercourses Act*, and dated the day of                      A.D. 189   , one owner of lot number (*describe his land, giving township or otherwise*) was adjudged to perform, and having failed in the performance of the same, it was subsequently let by me to the said                      for the sum of \$                     , and as he has now completed the performance thereof he is entitled to be paid the said amount                     .

I further certify that my fees and charges for my services rendered necessary by reason of such failure to perform are (*give items*) \$                     , and said amount payable to the said contractor, and the said fees and charges are chargeable on (*describe property to be charged therewith*) under the provisions of *The Ditches and Watercourses Act*, unless forthwith paid.

Dated this                      day of                      A.D. 189   .

(Signature of Engineer.)

Engineer for

# A DIGEST

OF

## ALL CASES REPORTED IN THIS VOLUME.

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### ACQUIESCENCE.

#### *Construction of Ditch—Damages.*

Failure by a landowner to object to the digging of a ditch upon his land does not relieve the township doing the work without a by-law from liability to damages.

Duggan v. Enniskillen, 81.

with the latter's consent by changing the assessment from "injuring" to "outlet" liability.

Wallace v. Elma, 295.

See NOTICE, 2—REPORT OF ENGINEER, 2, 5—BY-LAW, 2.

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### APPEAL.

#### 1. *Appeal to Supreme Court.*

There is no appeal to the Supreme Court in an action commenced in the County Court and transferred by order to the High Court. Leave to appeal cannot be granted under 60 & 61 Vic. ch. 34, sec. 1 (e) in a case not appealable under the general provisions of R. S. C. ch. 135.

Tucker v. Young, 44.

#### 2. *Interlocutory Order.*

An order assuming to refer back a report is not an interlocutory order within the meaning of sec. 90 of the Drainage Act, R. S. O. ch. 226, and an appeal lies to the Court of Appeal against it.

Adelaide and Warwick v. Metcalfe, 199.

### ACTION.

See DAMAGES, 8.

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### AMENDMENT.

#### 1. *Engineer's Report — Referee — Heading of Assessment.*

The Referee has jurisdiction with the engineer's consent and upon evidence given, to amend the engineer's report by changing assessments erroneously made for "outlet liability" to assessments for "injuring liability."

Mersea v. Rochester, 47.

#### 2. *Engineer's Report — Referee — Heading of Assessment.*

The Drainage Referee may amend the report of the engineer

3. *D. & W. Act, 57 Vic. ch. 55, sec. 22—Directory.*

The provisions of sub-sec. 6 of sec. 22 of 57 Vic. ch. 55 (O.), the Ditches and Watercourses Act, 1894, which require the Judge of the County Court to hear and determine an appeal from an award thereunder within two months after receiving notice thereof, are merely directory.

Re *McFarlane v. Miller et al.* 451.

See REPORT OF ENGINEER, 3—AWARD, 3 — ENGINEER, 2 — OWNER, 2.

### ASSESSMENT.

1. *Mode of—Injuring Liability.*

Proper mode of assessment upon lands from which water artificially caused to flow discussed.

Per Drainage Referee:—

In assessing for injuring liability the injured lands should be defined or be capable of being defined in order to ascertain the assessment upon the lands responsible for the injury.

*Mersea v. Rochester*, 60.

2. *Benefit—Injuring Liability — Outlet Liability.*

The Ontario Act 57 Vic. ch. 56, has not abrogated the fundamental principle underlying the provisions of the previous Acts of the Legislature respecting the powers of municipal institutions as to assessments for the improvement of particular lands at the cost of the owners, which rests on the maxim *qui sentit commodum sentire debet et onus*.

Lands from which no water is caused to flow by artificial means into a ditch having its outlet in another municipality than that in which it was initiated cannot be assessed for "outlet liability" under said Act.

Where a drainage work initiated in a higher municipality obtains an outlet in a lower municipality, the assessment for "outlet liability" therein is limited to the cost of the work at such outlet.

Every assessment, whether for "injuring liability" or for "outlet liability," must be made upon consideration of the special circumstances of each particular case and restricted to the mode prescribed by the Act. In every case there must be apparent water which is caused to flow by an artificial channel from the lands to be assessed into the drainage work, or upon other lands to their injury, which water is to be carried off by the proposed drainage work.

Assessment for "benefit" under the Act must have reference to the additional facilities afforded by the proposed drainage work for the drainage of all lands within the area of the proposed work, and may vary according to difference of elevation of the respective lots, the quantity of water to be drained from each, their distances from the work, and other like circumstances.

*Sutherland v. Romney*, 96.

3. *Engineer's Duty—Examination of each Lot.*

It is the engineer's duty in making an assessment to make such an

examination of each lot as will enable him to determine the part of the lot actually affected.

Warwick v. Brooke. 243.

#### 4. *Lands in Higher Township.*

The liability for assessment of the lands of a higher township should be measured by the cost of the enlargement of the proposed drainage work in the lower township, so as to give it sufficient capacity to carry down the waters from the higher township to their proper outlet.

Plympton v. Sarnia, 223.

#### 5. *Injuring Liability — Definable Area—Uniform Price per Acre —Benefit to Small Area.*

In order to justify an assessment for "injuring liability" the area claimed to be damaged by water from the lands assessed must be defined or definable.

The assessment of the cost of the drainage work, less the benefit assessment, at a uniform price per acre upon all the lands (high and low) contributing water, is improper.

The Drainage Act does not contemplate the assessment of a very much larger watershed in order to benefit lands in a small area or watershed.

Wallace v. Elma, 295.

*See* INJURING LIABILITY — DAMAGES, 6—REPAIR, 2.

### ASSESSMENT ROLL.

*See* PETITIONER, 1, 4.

### AWARD.

#### 1. *Fence Viewers' Act (C. S. U. C. ch. 57)—Non-compliance—Statutory Remedy.*

Declaration was held bad as setting out an award which did not fix the time each party should have within which to perform his share of the ditching, or direct where such ditching should be made; and also for not showing that a demand in writing had been made on the defendant to perform the award, the non-compliance with which would have entitled the plaintiff under the Act to have completed the ditch and sued for the price fixed instead of bringing an action for damages, which could not be maintained.

Murray v. Dawson, 395.

#### 2. *Fence Viewers—(C. S. U. C. ch. 57)—Location of Ditch—Entry —Justification.*

Held, following Murray v. Dawson, page 395, that the award was bad for not sufficiently defining the point of commencement and course and position of the ditch.

To an action for trespass on the plaintiff's land defendant pleaded justifying under the award, alleging that the plaintiff paid half the expense of the award as thereby directed, and that defendant, in pursuance of it, having first duly notified the plaintiff, entered on the plaintiff's land and opened the ditch there as directed by the award, doing no unnecessary damage. Held, that the plea was bad, as setting up a right which the award, being invalid, could not give; but that

the facts might be found to support a plead of leave and license.

Dawson v. Murray, 400.

3. *R. S. O. 1887 ch. 220, Ditches and Watercourses Act — Jurisdiction of Engineer—Appeal to County Judge—Notice of Letting Work—Time.*

Where the engineer of a municipal corporation purports to make an award under the Ditches and Watercourses Act with respect to the making of a drain, the affirmance of such award by the County Court Judge does not preclude the High Court from entertaining the objection that the engineer had no jurisdiction to make the award; nor is such an objection one for the determination of the County Court Judge alone. *Murray v. Dawson*, 17 C. B. 588, distinguished.

In the absence of a resolution of the municipal council such as is provided for by sec. 6 (b) of the Ditches and Watercourses Act, R. S. O. ch. 220, the question whether the engineer has jurisdiction to make an award depends upon whether before filing the requisition, the owner filing it has obtained the assent in writing of a majority of the owners affected or interested, as provided by sec. 6 (a); if he has obtained such assent, the engineer is immediately upon such filing clothed with jurisdiction, and the absence of the notice (form D) required by sec. 6, would not deprive him of such jurisdiction, but would form only a ground of appeal against his award.

The assent of the municipal corporation as one of the land-

owners interested may be shown by resolution passed by the council directing the engineer to proceed with the work.

The decision of the County Court Judge as to matters over which the engineer has jurisdiction can not be reviewed by the Court; and whether the plaintiffs were benefited by the proposed work was a matter to be determined by the engineer and the subject of appeal to the County Court Judge.

The mere publication by the engineer, within a year after the affirmance of an award, of a notice that he would let the work to be done upon the land of one of the persons affected by the award, and that such letting would take place after the expiry of a year from such affirmance, does not afford any ground for an action of trespass.

*York v. Osgoode*, 416.

See OWNER, 1, 2—ENGINEER,  
2—RAILWAY—COMPENSATION.

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**BENEFIT.**

See ASSESSMENT, 2.

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**BRANCH DRAINS.**

*Repair—Joint Scheme—Joint Assessment.*

A drainage work may include such branch drains as may be necessary, and the main drain and branches may be repaired and enlarged under one joint scheme and joint assessment.

*Mersea v. Rochester*, 47.

## BRIDGES.

### 1. *Access to Highways—Neglect to Provide—Remedy.*

Where an engineer in his report neglects or omits to provide for the construction or enlargement of bridges rendered necessary to afford access from the lands of owners to the travelled portion of the public highway, as required by sec. 9 (2) of the Municipal Drainage Act, no right of action is conferred on the person injured by such neglect or refusal, nor does the statute confer a right of appeal to the Court of Revision or to the Referee, but it does not follow that in an appropriate proceeding and on it clearly appearing that the judgment of the engineer was either mala fide or erroneous, the Court would not review the exercise by the engineer of the power in this regard conferred on him by the Act.

Fairbairn v. Sandwich South, 133.

### 2. *Drain on Boundary Line.*

Claim for bridges not allowed where the drain formed the boundary line between the properties of the claimant.

Rhodes et al. v. Raleigh, 141.

### 3. *Highway Bridges—Renewal—Assessment.*

Although the proposed work may be substantially for the repair and improvement of a highway by renewing a culvert or bridge, the municipality having jurisdiction over the highway is not bound to make the repairs rendered neces-

sary by the construction and operation of the drain, at its own expense, but the lands and roads liable for the maintenance of the drain may be legally assessed for their proper proportions of the proposed work.

Camden v. Dresden, 308.

## BY-LAW.

### 1. *Registration—Want of Jurisdiction.*

The provisions of the Municipal Act as to the registration of by-laws for contracting debts apply to by-laws for the issue of debentures for drainage work, but the by-law in question being without jurisdiction the registration was declared ineffectual and void by the Supreme Court.

Sutherland v. Romney, 85, 96.

### 2. *Status of Applicant—Time—Report, Plans, etc.—Insufficient Estimates—Description—Amendment.*

It is not essential that a ratepayer applying to quash a drainage by-law should be specifically assessed for the proposed work.

Where notice of the motion to quash is given within six weeks ensuing the final passing of the by-law, the motion may be heard after the expiration of such period.

A by-law is defective which does not provide for the work being done according to the report, plans, etc., as adopted.

Where the estimates do not comply with section 59 of the Drainage Act, which requires the cost

of the work within each municipality and upon the road allowances to be estimated separately, the by-law adopting them is defective.

Instances of defective descriptions of land.

The power of the Drainage Referee to amend by-laws is confined to provisional by-laws and does not extend to by-laws finally passed.

Byrne v. North Dorchester, 318.

### 3. Quashing—Damages.

The by-law in question in this action was declared invalid, the petition therefor not having been properly signed within the meaning of sec. 3, but not having been quashed, the plaintiff was held not entitled to damages for work done under it.

Challoner v. Lobo, 336.

See REPORT OF ENGINEER, 1.

## COMPENSATION.

*Ditches and Watercourses Act—Municipal Corporation—Award—Damages.*

Where a municipal corporation has pursuant to an award in proceedings initiated by it under the Ditches and Watercourses Act, constructed, without negligence, a drain from a highway to a river through an adjoining owner's land, it is not liable to make compensation under the Municipal Act to that adjoining proprietor in case his land has been injuriously affected by the drain.

In re McLellan v. Chingaucousy, 534.

See EASEMENT.

## COSTS.

### 1. Neglect to Repair — Division Court Scale.

Costs were allowed on the Division Court scale where the judgment for neglect to repair awarded forty dollars damages.

Fairbairn v. Sandwich South, 133.

### 2. Scale of—Drainage Trials' Act, 1891, sec. 24, sub-sec. 4.

Where actions begun in the High Court were referred at the trial to the Drainage Referee, and upon appeal from his report an order was made by an appellate court for taxation and payment of costs of the actions:—

Held, that they were not costs coming within the provisions of sec. 24, sub-sec. (4) of the Drainage Trials' Act, 1891, but were to be taxed in the usual way in which costs of actions are taxed, and subject to the same right of appeal.

Crooks v. Ellice, Hiles v. Ellice, 323.

### 3. Scale of—Drainage Trials Act, 1891, sec. 24 (3).

Action brought in the High Court of Justice in 1890 to recover damages for injuries caused to the plaintiff's land by reason of the negligent construction of certain drains by the defendants, and by reason of their omission to keep such drains in repair, and for a mandamus.

After a judgment referring the action to a special referee, set aside by the Court of Appeal, 14

P. R. 429, an order was made under sec. 11 of the Drainage Trials' Act, 1891, referring the action to the Drainage Referee, who made his report in favour of the plaintiff, assessing damages at over \$500 and allowing the plaintiff costs. He referred the taxation of the plaintiff's costs to the clerk of the County Court of the county of Kent to tax them upon the scale of the County Court.

Fewster v. Raleigh, 235.

4. *Scale of—Reference—R. S. O. (1897) ch. 226, sec. 94.*

Section 113 of the Drainage Act, R. S. O. ch. 226, providing that the tariff of the County Court shall be the tariff of costs under that Act, applies only to actions which ought properly to have been instituted by notice under sec. 93, and not to actions which might properly be brought notwithstanding the Drainage Act, and which are referred to the Referee under sec. 94 only because the Court thinks they may be more conveniently disposed of by him.

McCulloch v. Caledonia, 326.

5. *Scale of—Reference—R. S. O. (1897) ch. 226, sec. 93.*

Where an action is brought to recover damages for injury to property by the construction of drainage works, and the claim is within the scope of sec. 93 of the Drainage Act, R. S. O. ch. 226, under which proceedings before the Drainage Referee may be taken without bringing an action, and an order is made referring the action to the Referee for trial, the costs should be taxed according to

the tariff of the County Court under sec. 113.

Moke v. Osnabruck, 328.

6. *Scale of—Appeal from Referee.*

The costs of an appeal to the Court of Appeal from the decision of the Drainage Referee in a proceeding under the Drainage Act initiated before him should (if awarded to either party) be taxed on the scale applicable to appeals in cases begun in the High Court of Justice.

Re Metcalf and Adelaide and Warwick.

Re Colchester North and Gosfield North, 334.

See DAMAGES, 6 — NON-COMPLETION, 3.

**DAM.**

See OBSTRUCTIONS.

**DAMAGES.**

1. *Void By-law—Drainage Area.*

Where a by-law for the construction of drainage works is void, damages awarded on account of injury caused by negligent construction are not to be charged against the drainage area assessed for the work, but are chargeable against the initiating municipality.

McCulloch v. Caledonia, 1

2. *Mode of Assessing.*

Amount of damages arrived at by taking the mean of the estimates given by the different witnesses.

Duggan v. Enniskillen, 81.



### 3. *Construction of Drain.*

Measure of damages for lands occupied by channel of drain, for lands occupied by earth excavated from the drain, and for negligent and improper dumping of the excavated earth, discussed.

Rhodes et al. v. Raleigh, 141.

### 4. *Joint Liability—Division of Township.*

Where a township after constructing a drain under the drainage clauses of the Municipal Drainage Act was divided into two separate townships, part of the drain and of the lands benefited by it being situated in each of the divided townships, both of the divided townships were held jointly liable for damages to lands caused by the construction of the drain.

Wigle v. Gosfield South and Gosfield North, 186.

### 5. *Non-repair — Insufficiency of Original Drain.*

A complainant is entitled to recover for any injury to the use and enjoyment of his land or for its depreciation in value, if caused by failure to keep a drain in repair, but not for depreciation in value based upon the alleged insufficiency in size of the drain as originally made.

McKim v. East Luther, 229.

### 6. *Assessment for—R.S.O. (1897) ch. 226, secs. 86 and 95.*

Damages and costs, including costs of defence, payable by a municipality in respect of actions arising out of drainage works, may be assessed against the lands and

roads originally assessed for construction in proportion to their assessment, and each municipality which comprises any lands or roads so assessed is bound to pay over its proper proportion of the damages and costs to the initiating municipality.

Elma v. Ellice, 259.

### 7. *Ditches and Watercourses Act, 1883, sec. 13—Default of Engineer—Approximate Cause.*

The provision of sec. 13 of the above Act as to the inspection by the engineer is imperative, and an action would lie for breach of his duty; but even if the evidence had shown such a breach the damages claimed were not the proximate, necessary, or natural result thereof.

The other provisions of sec. 13 are merely permissive, and no action would lie for their non-performance; nor, were it otherwise, could it be held that the damages claimed were the proximate result of such non-performance.

Those who, by the terms of the award ought to have done the work, were the persons proximately responsible for the damages.

O'Byrne v. Campbell, 408.

### 8. *Ditches and Watercourses Act—Failure to Comply with Award.*

No action lies to recover damages because of failure to comply with an award made under the Ditches and Watercourses Act; the remedy, if any, being under the Act itself.

Dalton v. Ashfield, 455.

*See* NON-REPAIR—REPORT OF ENGINEER, 5—NON-COMPLETION, 1, 2, 3—BY-LAW, 3—AWARD, 1—RAILWAY—COMPENSATION.

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### DEBENTURES.

*R. S. O. (1897) ch. 226, sec. 83, Time for Payment—Work of Improvement.*

Section 83 of the Municipal Drainage Act, R. S. O. ch. 226, limiting the time for payment of debentures to seven years, does not apply to debentures issued for the cost of extending, improving or altering a drainage work.

*Sutherland v. Romney*, 85.

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### DECLARATION OF OWNERSHIP.

*See* OWNER, 2.

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### DESCRIPTION.

*See* BY-LAW, 2.

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### DIVISION OF TOWNSHIP.

#### 1. *Duty to Repair—Damages.*

Upon the division of a township by statute 55 Vic. (Ont.) ch. 85 into two separate townships the duty of maintaining a drain constructed by the original township devolved upon the newly created township in which the drainage work is situated, and such township became liable for all the consequences of its neglect to keep the drain in repair.

*Fairbairn v. Sandwich South*, 133.

#### 2. *Damages—Repair—Joint Action.*

A township, in which extensive drainage works had been constructed, was divided into two townships by a statute which provided that the assets and debts of the original municipality should be divided between the new municipalities, each remaining liable as surety for the proportion of the debts it was not primarily liable to pay, and the provisions of the Municipal Act as to the separation of a junior from a senior township to be applied, as far as possible:—

Held, that an action for damages incurred before the division caused by the drainage works, part of the area of which was in each township, and asking to have the drains kept in repair, must be brought against both townships and not against that one only in which the plaintiff's land was situated.

*Wigle v. Gosfield South*, 175.

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### EASEMENT.

#### *Channel of Drain—Right of Municipality—Basis for Compensation.*

Though the owner's estate and ownership in the soil of lands used as the channel of the drain constructed under the Municipal Drainage Act are not expropriated or vested in the municipality, the municipality on behalf of the owners of land benefited by the drain, acquires a right of entry upon, and user of, and easement

over, such lands substantially equal to a taking or an expropriation of the lands for the purposes of the drain, and their value should therefore be estimated and dealt with on the same basic principle of full compensation as for lands taken and expropriated for public purposes under the Municipal Act.

Rhodes et al. v. Raleigh, 141.

### EMBANKING.

*Municipal Drainage Act, sec. 3, sub-sec. 2—Spoil Bank.*

Section 3, sub-sec. 2, of the Municipal Drainage Act relates to the reclamation of wet or submerged lands and is not applicable to a work in the construction of which banks are formed with the spoil cast from the dredge.

Sutherland v. Romnev. 85.

### ENGINEER.

1. *Change of—Supervision of Work.*

It is not necessary that a drainage work be under the supervision of the engineer who draws the plans and specifications and makes the report; the work may be carried out under the direction of any competent person whom the municipality may choose to employ.

Ranney v. Crowley, 355.

2. *Ditches and Watercourses Act (R. S. O. 1897 ch. 285, s. 4)*  
—*Revocation—Notice—New Engineer—Jurisdiction—Estoppel—Appeal.*

The defendants' council duly appointed R. engineer under the

Ditches and Watercourses Act, and he accepted the office. Subsequently they without any notice to him and without any by-law expressly revoking his appointment, duly passed a by-law purporting to appoint S. as such engineer; the latter by-law in no way referring to the former or to R.:—

Held, that the prior appointment had not been revoked; that S. did not become "the engineer;" and that an award purporting to be made by him as such engineer under the Act was invalid.

The point having been raised and overruled upon an appeal against the award, there was nothing to prevent its consideration in a proceeding attacking the jurisdiction.

Turtle v. Euphemia, 513.

*See OATH OF ENGINEER—DAMAGES, 7—AWARD, 3—MANDAMUS, 3.*

### ESTIMATES.

*See BY-LAW, 2.*

### ESTOPPEL.

*See ENGINEER, 2.*

### FARMERS' SONS.

*See PETITION, 2, 4.*

### FENCING.

*Cost of—Damages.*

The cost of fencing a drain not allowed as part of the landowner's damages.

Rhodes et al. v. Raleigh, 141, 20.

**IMPROVEMENT.**

*Municipal Drainage Act, sec. 75—  
Drain Passing Through Dif-  
ferent Municipalities.*

Any municipality charged with the duty of keeping in repair the portion of a drain within its limits has authority under sec. 75 to initiate and carry out such improvements as may be necessary and advisable, although the drain which passes through different municipalities was initiated and constructed by another municipality.

Camden v. Dresden, 308.

See MANDAMUS, 2.

**INDEPENDENT JUDGMENT.**

See REPORT OF ENGINEER, 4.

**INJUNCTION.**

*Division of Township — Continu-  
ance of Damages.*

A township having constructed drainage works under a by-law which caused damage to the plaintiffs' lands, was divided by statute into two townships.

Held, that the new townships were both liable to be restrained by injunction from continuing the damages.

Wigle v. Gosfield South and Gosfield North, 186.

**INJURING LIABILITY.**

*Lands Adjoining Drainage Work.*

The term "injuring liability" cannot be held to apply to the case

of an individual owner of lands adjoining the proposed drainage work merely because the water from one portion of his land flows upon and injures another portion of the same owner's lands.

Warwick v. Brook, at page 245.

See AMENDMENT, 1 — ASSESSMENT, 2, 5 — NATURAL WATERCOURSES, 3.

**INSPECTION.**

See VIEW.

**INTERLOCUTORY ORDER.**

See APPEAL, 2.

**JURISDICTION.**

See REFEREE — AWARD, 3 — OWNER, 2—ENGINEER, 2—RAILWAY.

**LOCAL MASTER.**

*Jurisdiction — Drainage Action—  
Reference.*

A local master of the High Court has jurisdiction by virtue of Rules 42 and 49—see also Rule 6(a)—to make an order, under sec. 94 of the Municipal Drainage Act, R. S. O. 1897 ch. 226, referring an action brought in his county to the Referee under the drainage laws.

McKim v. East Luther, 229.

**LOCATION OF DRAIN.***Profiles—Stakes—Evidence.*

The intention of the engineer as to the location of the drain must be ascertained from the plans, profiles, specifications, report and the stakes planted by the surveyor, and such intention, except in as far as it may be gathered from such data, can not be ascertained or received as evidence.

The words "along lot lines 33-34" appearing on the profile construed as indicating the locality and not as defining the location of the drain.

Ranney v. Crowley, 355.

**MAINTENANCE AND REPAIR.**

See DIVISION OF TOWNSHIP, 1  
—MANDAMUS, 2—IMPROVEMENT.

**MANDAMUS.**1. *Notice.*

In the absence of the written notice required by sec. 73 of the Drainage Act, a mandamus will not be granted.

Fairbairn v. Sandwich South, 133.

2. *Improvement of Drain—Municipal Drainage Act, secs. 73, 74 and 75.*

Where a drain is not out of repair the Drainage Referee has no authority to order a mandamus to compel the improvement of the drain under the provisions of sec.

75 of the Municipal Drainage Act. Secs. 73, 74 and 75 considered.

Rayfield v. Amaranth, 283.

3. *Ditches and Watercourses Act (R. S. O. 1887 ch. 220)—Default of Engineer.*

An engineer having declined to attend pursuant to notice from the clerk,

Held, that a mandamus would not lie against a municipal corporation to compel their engineer to act in the premises.

Dagenais v. Trenton, 445.

See NOTICE, 1, 3 — NON-COMPLETION, 1, 2

**NATURAL WATERCOURSE.**1. *Repair—Improvement—Sec. 75 Municipal Drainage Act.*

Sec. 75 of the Municipal Drainage Act does not apply to the repair or improvement of a natural watercourse.

Mersea v. Rochester, 60.

2. *Widening and Deepening—Assessment for Cost — Sec. 75, Municipal Drainage Act.*

The cost of widening and deepening a natural watercourse for the purpose of draining lands is not assessable upon particular lands under sec. 75, but must constitute a charge upon the general funds of the municipality.

Sutherland v. Romney, 96.

3. *Injuring Liability.*

Under sub-sec. 3 of sec. 3 of R. S. O. ch. 226, lands in one municipality from which water has been

caused to flow upon and injure lands in another municipality, either immediately or by means of another drain, or by means of a natural watercourse, may be assessed and charged for the construction and maintenance of a drainage work required to relieve the injured land from such water.

Orford v. Howard, 163.

#### 4. *Right of Drainage Into.*

Every owner of land who claims a legal right to throw water back or to increase or diminish the quantity of water which is accustomed to descend its natural watercourse whereby other owners of land sustain actual damage must prove either an actual grant or license or a right by prescription.

Wigle v. Gosfield South, at page 176.

### NEGLIGENCE.

#### 1. *Adoption of Engineer's Plan—Action.*

An action does not lie where a council acting in good faith adopts and carries out the plan of an engineer.

Murphy v. Oxford, 20.

#### 2. *Drainage into Pond—Overflow—Damages.*

If the owner of land drains the water from it into a pond which is not large enough to hold the additional volume thus brought into it, he is liable in damages to a person whose land is flooded by water overflowing from such pond.

Young v. Tucker, 35.

### NON-COMPLETION.

#### 1. *Damages—Mandamus.*

The defendant township having undertaken the construction of a drain, for which plaintiff was assessed, and failed to complete it, was held responsible for damages, and a mandamus was ordered requiring the township to provide drainage for the plaintiff's land.

Shaver v. Winchester, 279.

#### 2. *Damages—Mandamus.*

Defendant held responsible for damages caused by the non-completion of a drain and non-repair of the portions completed, and mandamus ordered directing the defendants to complete and repair the drain.

Hanson v. Matilda, 281.

#### 3. *Ditches and Watercourses Act, 1883 — Work not in Accordance with Award—Remedy under Sec. 13.*

Where an award has been made under the Ditches and Watercourses Act, 1883, the only remedy for the non-completion of the work in accordance with the award is that provided by sec. 13 of the Act.

No other or greater costs were allowed to the defendant than if they had successfully demurred instead of defending and going down to trial.

Hepburn v. Orford, 411.

See DAMAGES, 7.

### NON-REPAIR.

#### *Damages.*

A person who or whose property is injuriously affected by the con-

dition of a drain is entitled to recover from the municipality charged with the duty of maintaining it, such damage as he sustains by reason of its non-repair, whether caused by the flooding of his land by the waters of the drain, or by its failure to carry off the water which came upon the land in the course of nature.

Crawford v. Ellice, 151.

See NOTICE, 1, 3—VIS-MAJOR.

### NOTICE.

#### 1. *Mandamus—Municipal Drainage Act, sec. 73.*

To entitle a person to a mandamus, the notice required by sec. 73 must be so clear and precise that the municipality can decide whether the complaint is well founded or frivolous, and must be one which the municipality would be justified in acting upon under sub-sec. (a) of that sec.

The notice by which proceedings are initiated in Court cannot be regarded as a notice under sec. 73.

Crawford v. Ellice, 151.

#### 2. *Municipalities Jointly Liable—Amendment—Refiling.*

Where townships are jointly liable for damages a notice to one of them is a sufficient compliance with sec. 93 of the Municipal Drainage Act in order to hold both townships responsible.

The statements of claim filed with the local registrar allowed to be amended and to stand as claims under sec. 93, and claims as

amended, ordered to be filed with the County Court clerk.

Wigle v. Gosfield South and Gosfield North, 186.

#### 3. *Sufficiency of Notice—Pleading—Mandamus.*

A letter written by the complainant's solicitor stating that the land in question has been flooded by water from a drain constructed by the municipality, but not saying anything as to the drain's condition, and asking them to construct such drainage work as is required to relieve the lands, is not a sufficient notice under sec. 73 of the Drainage Act to justify the issue of a mandamus. Objection to the sufficiency of the notice may be taken by the defendants at any stage of the action without pleading want of notice.

McKim v. East Luther, 329.

See MANDAMUS, 1.

### OATH OF ENGINEER.

#### *Failure to Take.*

Taking the oath prescribed in sec. 5 of the Municipal Drainage Act is an essential pre-requisite to the exercise of jurisdiction by the engineer under sec. 75 of that Act.

Colchester North v. Gosfield North, 206.

### OBSTRUCTIONS.

#### *Removal of Dam — Consolidated Municipal Act, 1883, sec.*

570, sub-secs. 18, 19  
and 20.

The amendment to sec. 570 of the Consolidated Municipal Act.

1883, made by sec. 22 of the Municipal Amendment Act, 1886, authorized the upper municipality to remove obstructions in a drain situated in the adjoining lower municipality, and to assess the lower municipality for its proportion of the cost.

Elizabethtown v. Augusta, 363, 378.

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### OFFICIAL REFEREE.

See REFEREE.

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### OUTLET.

1. *Sec. 75, Municipal Drainage Act*  
—*Provision for.*

A drainage scheme under section 75 of the Drainage Act, 1894, cannot be upheld unless provision be made for a sufficient outlet.

Re Raleigh and Harwich, 12.

*Sufficient Outlet—Continuance into Adjoining Municipality.*

The Municipal Drainage Act does not authorize the enlargement and improvement of a drain to a point beyond the limits of the initiating municipality unless the work be continued to a sufficient outlet.

Wigle v. Gosfield South and Gosfield North, 186.

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### OUTLET LIABILITY.

See AMENDMENT, 1 — ASSESSMENT, 2.

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### OWNER.

1. *Ditches and Watercourses Act—*  
(*R. S. O. 1887 ch. 220*)—*Requisition—Owner—Tenant at Will.*

The word "owner" as used in the Ditches and Watercourses Act, R. S. O. 1888 ch. 220, means the actual owner and not the assessed owner; and a tenant at will of land affected, assessed as owner, is not an owner affected or interested within the meaning of the Act.

York v. Osgoode, 432, 440.

2. *Ditches and Watercourses Act, 1894—Option to Purchase—Declaration of Ownership.*

A lessee of land with an option to purchase the fee is not an owner who can initiate proceedings for construction of a ditch under the Ditches and Watercourses Act, 1894.

If the initiating party is not really an owner, the filing of a declaration of ownership under the Act will not confer jurisdiction, and sec. 24 of the Act does not validate an award where the party initiating the proceeding is not an owner.

Logan v. McKillop, 475, 499.

3. *Ditches and Watercourses Act. (R. S. O. 1897 ch. 285)—Municipal Corporation.*

A municipal corporation is an "owner" within the meaning of the Ditches and Watercourses Act in respect of highways under its jur-



isdiction, and as such may initiate proceedings under that Act.

*In Re McLellan and Chingua-cousy*, 534.

*See* PETITION, 4.

### PETITION.

#### 1. *Persons to be Counted—Secs. 59 and 75 Drainage Act—Neighboring Municipalities.*

The persons to be counted in computing the majority required in a petition for a drainage work are the assessed persons within the described drainage area, who are (1) owners whose lands are to be "benefited;" (2) owners whose lands are to be assessed for "injuring liability," and (3) owners whose lands are to be assessed for "outlet liability."

Sec. 59 of the Municipal Drainage Act does not dispense with the necessity for a petition.

Section 75 of the Municipal Drainage Act does not authorize a neighboring municipality without a petition to initiate a drainage scheme within its own territory, and connect it with the drainage system of another municipality in which the area of such drainage system wholly lies.

*Plympton v. Sarnia*, 233.

#### 2. *Status — Assessment Roll — Farmers' Sons.*

In proceedings under the Drainage Act, the assessment roll is conclusive as to the status of the persons mentioned in it, and evidence is not admissible to show that a person entered on the roll as owner is in fact a farmer's son and has

been entered on the roll as owner by the assessor's error.

*Warwick v. Brook*, 243.

#### 3. *Majority to be of Those Assessed for Benefit.*

The petition for a drainage work must be signed by a majority of the owners as shown by the last revised assessment roll within the drainage area who are assessed for benefit.

*Lovett v. Colchester North*, 306.

#### 4. *Assessment Roll—Farmers' Sons —Owner.*

Per Meredith, C.J.—The assessment roll last revised previous to the passing of a drainage by-law is the one to be looked at for the purpose of ascertaining the sufficiency of the petition.

The words "exclusive of farmers' sons not actual owners" in subsec. 1 of sec. 3, R. S. O. 1897 ch. 226, do not refer to farmers' sons who are not actual owners in fact, but to farmers' sons so shown by the last revised assessment roll.

An arrangement between a farmer and his sons by which he promised to convey the farm to them, he retaining a life interest, is sufficient to give them an interest in the land of a freehold nature, entitling them to be assessed as joint owners and so assessed, they are not "farmers' sons not actual owners."

Per Court of Appeal: The "last Revised Assessment Roll" which governs the status of petitioners in proceedings under the Drainage Act is the roll in force at the time the petition is adopted by the council and referred to the engineer for

enquiry and report, and not the roll in force at the time the by-law is finally passed.

Challoner v. Lobo, 336, 344.

until after the determination of the appeal in the other.

Tilbury West v. Romney, 352.

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### PLEADING.

See NOTICE, 3.

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### PRACTICE.

1. *Application to Set Aside Engineer's report—Affidavit.*

The evidence on an application by a ratepayer to set aside the engineer's report, plans, etc., directed to be taken by affidavit and cross-examination thereon.

Lovett v. Colchester North, 306.

2. *Stay of Proceedings—Prior Action Pending—Parties.*

In this action the plaintiff sought to recover the sum assessed upon the defendant for the cost of certain drainage works constructed by the plaintiff. In a previous action against the same defendants, the plaintiffs therein, who were land owners in the defendants' township and assessed for a portion of the sum now sued for, sought a declaration that the defendants' by-laws were void, and an injunction to restrain proceedings for the collection of the amount for which the plaintiffs therein were assessed. In that action judgment had been given in the defendants' favour, but the plaintiffs had an appeal to the Supreme Court of Canada pending when the present action was brought: Held, that the present action should not be stayed

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### PURCHASER.

See AWARD, 4.

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### RAILWAY.

*Ditches and Watercourses Act—Award—Jurisdiction—Damages.*

There is no jurisdiction under the Ditches and Watercourses Act to compel the construction of a ditch on the lands of a railway which has been declared to be a work for the general advantage of Canada, and the township having constructed a ditch pursuant to an award as far as the railway lands which the railway did not allow to be continued and which caused the damages complained of, the township was held liable, the award not justifying the work.

McCrimmon v. Yarmouth, 522.

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### REFEREE.

*Jurisdiction—Official Referee.*

The Drainage Referee appointed for the purpose of the drainage laws is not an "Official Referee" within the meaning of secs. 28 and 29 of the Arbitration Act. R. S. O. ch. 62. His jurisdiction is limited to the administration of proceedings under the Drainage Act.

Bryce v. Brooke, McClure v. Brooke, 391.

**REFERENCE.**

*See* LOCAL MASTER.

**REPAIR.**1. *Cost of—County By-law.*

The cost of repairing a drainage work constructed under a county by-law to its original capacity should be assessed only against lands and roads in the township which failed to keep in repair the portion of the drain within its limits.

Mersea v. Rochester, 60.

2. *Change in Assessment.*

The circumstances existing at the time of the original construction of the drain in question having changed, the assessment upon the appellant township was reduced to a less proportion of the cost than it paid for original construction.

Edwardsburg v. Matilda, 29i.

**REPORT OF ENGINEER.**1. *Alteration by Council—Void By-law.*

A council has no authority to alter the report of an engineer reducing the size and cost of a drainage work, and a by-law founded upon a report so altered is void.

McCulloch v. Caledonia, 1.

2. *Amendment—Reference Back to Engineer.*

The Drainage Referee cannot, under sec. 89 of the Drainage Act,

R. S. O. ch. 226, upon the admission of the initiating township that the report appealed from is defective, refer it back against the wishes of the appealing townships, to the engineer for amendment.

Adelaide and Warwick v. Metcalfe, 199.

3. *Reference Back by Council—Appeal Pending.*

While an appeal to the Drainage Referee against a report is pending, the initiating municipality cannot refer back the report to the engineer for amendment.

Colchester North v. Gosfield North, 206.

4. *Maintenance and Improvement—Engineer—Independent Judgment.*

An engineer's report made upon instructions from a municipal council and providing for the maintenance and improvement of a drain previously constructed, which it was the duty of the municipality to keep in repair, is not open to objection merely because, in the judgment of the engineer, the original plan on which the drain was constructed was a mistake, and one he would not have adopted.

Dover v. Chatham, 213.

5. *Alteration—Damages.*

Before the report, plans and assessment of the engineer for a drainage scheme have been adopted by a council it can refer them back to him for further consideration or for amendment, but after

they have been adopted it can not of its own motion change or amend them, and if the drainage scheme is carried out with a material change the municipality is not protected, and is liable to make good any damages resulting from the work.

Priest v. Flos, 267.

6. *Use of Previous Examination—Plans and Assessment.*

A report based upon an examination made for a work which proved abortive and the plans and assessment therefor were held to be sufficient for a work founded on a new petition without a fresh examination of the creek in question and preparation of new plans and a new assessment.

Elizabethtown v. Augusta, 378.

**REQUISITION.**

See OWNER, 1.

**RESOLUTION.**

*Appointment of Engineer.*

The appointment of an engineer by resolution is not open to objection after the adoption of his report by a provisional by-law of the council appointing him.

Camden v. Dresden, 308.

**REVOCATION.**

See ENGINEER, 2.

**STAY OF PROCEEDINGS.**

See PRACTICE, 2.

**SUPREME COURT.**

See APPEAL, 1.

**TENANT AT WILL.**

See OWNER, 1.

**TIME.**

See AWARD, 3.

**VIEW.**

*Duty of Referee.*

The Drainage Referee in trying an action may proceed partly on view, but in so doing must follow strictly the directions of the Act, and not make the view without appointment or notice to the parties. If he do so proceed, however, his finding, though partly on the view, may be upheld if the evidence supports it.

McKim v. East Luther, 229.

**VIS MAJOR.**

*Want of Repair — Extraordinary Rainfall.*

A municipality liable to keep a drain in repair cannot escape liability on the ground that the injury was caused by an extraordinary rainfall unless it is shown that even if the drain had been in repair the injury would have resulted.

Mackenzie v. West Flamboro, 29.



# **MUNICIPAL DRAINAGE ACT.**

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## **RULES FRAMED BY THE REFEREE.**

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Copy of an Order-in-Council approved by the Honourable Charles Moss, Administrator of the Government of the Province of Ontario, the 31st day of July, A.D. 1903.

Upon the recommendation of the Honourable the Attorney-General, the Committee of Council advise that pursuant to the provisions of sections 111, 112, and 113 of the Municipal Drainage Act, the accompanying Rules framed by the Referee, regulating the practice and procedure to be followed in all proceedings before him under the said Act be approved by Your Honour, and that the same be published in THE ONTARIO GAZETTE.

Certified.

J. R. CARTWRIGHT,  
Clerk, Executive Council.

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## **RULES OF PRACTICE UNDER THE MUNICIPAL DRAINAGE ACT.**

The following Rules framed by the Referee for regulating the practice and procedure to be followed in all proceedings before him under 'The Municipal Drainage Act' under the authority of section 112 of the said Act, and approved by the Lieutenant-Governor-in-Council were published in THE ONTARIO GAZETTE on the        day        , 1903:

1. These Rules shall take effect on the first day of September, 1903.

2. As to all matters not provided for by these Rules and by 'The Municipal Drainage Act' the Rules and practice for the time being of the High Court of Justice shall be followed so far as the same are applicable.

3. The provisions of 'The Interpretation Act' and the interpretation clauses of 'The Judicature Act' and 'The Municipal Drainage Act' shall apply to these Rules unless there is anything in the subject or context repugnant thereto.

4. In these Rules 'Referee' shall mean the Referee for the time being appointed for the purpose of the Drainage laws pursuant to the provisions of 'The Municipal Drainage Act.'

5. Unless otherwise directed by the Referee the trial of all assessment appeals, claims for damages, motions against by-laws and other applications under the Act except for directions, shall be held at the court house of the county or city in which the drainage work or proposed drainage work is situated, and if situated in more than one county then in the court house of the county or city in which the municipality initiating the work in question is situated.

6. A notice claiming damages, a notice of motion or other document by which an appeal, matter or proceeding may be commenced under 'The Municipal Drainage Act' shall be deemed to have been properly served if the defendant by his solicitor accepts service and undertakes to appear.

7. Where under section 93 of 'The Municipal Drainage Act' service is required to be made upon a municipal corporation it may be made on the head or the clerk thereof.

8. Where by 'The Municipal Drainage Act' it is provided that an affidavit of service of a copy of a notice of appeal or of any other notice shall be filed with the county court clerk and acceptance of service by a solicitor or firm of solicitors duly verified may be filed in lieu of such affidavit.

9. In all proceedings before the Referee the following style of cause shall be sufficient:—

IN THE HIGH COURT OF JUSTICE.

In the Matter of the Municipal Drainage Act.

Between:

|      |            |
|------|------------|
| A B. | Plaintiff, |
| and  |            |
| C.D. | Defendant. |

10. Where a plaintiff institutes any proceedings by a solicitor the notice of appeal or other initiating notice shall contain by endorsement or otherwise the solicitor's name or firm and place of business, where notices, orders, appointments, and other documents, proceedings and written communications may be served.

11. (1) Where a plaintiff institutes any proceedings in person the notice of appeal or other initiating notice shall contain by indorsement or otherwise his place of residence and occupation.

(2) If his place of residence is more than two miles from the office of the clerk of the county court of the county in which the municipality initiating the drainage work in question is situated there shall be stated also another proper place which shall not be more than two miles from such office, to be called his address for service, where notices, orders, appointments and other documents, proceedings and written communications may be served.

(3) If the requirements of this Rule are not complied with the opposite party shall be at liberty to proceed by posting up in the office of the clerk of the county court all notices, orders, appointments and other documents, proceedings and written communications requiring service.

12. Every notice initiating proceedings to which an appearance is required to be entered shall be endorsed with a notice requiring an appearance to be entered in the proper office and that in default the defendant will not be entitled



to notice of any further proceedings. Such notice may be in the form following:—

“Take notice that you are required within ten days after the service of this notice on you, inclusive of the day of such service, to cause an appearance to be entered for you in the office of the clerk of the county court of the county of                      , and in default of your so doing you will not be entitled to notice of any further proceedings herein.”

13. A defendant served with any notice of appeal or any notice under section 93 of ‘The Municipal Drainage Act’ other than notice of motion on applications shall appear within ten days including the day of service.

14. A defendant shall appear by fying with the clerk of the county court in whose office the notice of appeal or other notice has been fyled a memorandum in writing stating if the defendant appears by solicitor the name and place of business of such solicitor or if the defendant appears in person stating that such defendant so defends in person giving his address and naming a place to be called his address for service which shall not be more than two miles from the office where the appearance is required to be entered.

15. If the memorandum does not contain the address of the solicitor or the defendant (as the case may be) it shall not be fyled; and if such address is illusory or fictitious the appearance may be set aside by the Referee and thereafter unless otherwise ordered the plaintiff may proceed as if the defendant had not appeared.

16. Upon a memorandum of appearance being fyled the officer shall forthwith note the same in the procedure book.

17. A defendant may appear at any time before judgment. If the defendant appears after the time limited for appearance he shall forthwith give notice thereof, and if he appears after the time appointed and omits to give such notice the plaintiff may proceed as in case of non-appearance.

18. In default of appearance the party in default shall not be entitled to notice of any further proceedings other than by posting up in the office where the appearance is required to be entered.

19. Either party shall be at liberty as soon as the defendant has appeared or the time for appearance has expired to apply to the Referee on two clear days notice to the opposite party for a general order fixing the procedure to be followed, and upon such application the Referee shall, unless there is some good reason for postponing the giving of directions as to any particular proceedings, make a general order directing all the subsequent proceedings down to the Inspection to be taken by all parties and fixing the times therefor; and the several provisions of such general order shall be carried out by præcipe orders issued by the clerk of the county court in whose office the general order is fyled.

20. A copy of the general order and any other orders and appointments made by the Referee shall be forthwith served upon the opposite party and fyled with the clerk in whose office the proceedings are pending.

21. The party instituting the proceedings shall at least one clear day before the trial deposit with the clerk for the use of the Referee a copy certified by the clerk of the notice initiating the proceedings, all defences and objections to the appeal or reference and any other papers fyled showing the issues to be tried.

22. Upon the trial of appeals under section 63 of "The Municipal Drainage Act" it shall be the duty of the initiating municipality to produce the original report, plans, specifications, assessments and estimates of the engineer or surveyor and the provisional by-law in question, and also to produce the engineer or surveyor for cross-examination.

23. Unless otherwise directed the plaintiff or party appealing shall begin and after the evidence in defence shall have the right of reply.

24. Upon application under section 93 of "The Municipal Drainage Act" copies of the affidavits upon which the notice of motion is based shall be served with the notice, and in the absence of directions to the contrary, affidavits in defence shall be fyled and served within ten days thereafter and affidavits in reply shall be fyled and served within ten days after service of the affidavits in defence.

25. After service of a notice of motion either party may apply to the Referee on two clear days' notice to the opposite party for directions as to the procedure on the motion and a copy of the Referee's order shall be forthwith served upon the opposite party and fyled with the clerk in whose office the affidavits are fyled.

26. Whenever during the progress of an appeal, reference or application the Referee requires a copy of any evidence taken by the stenographer the same shall be supplied by the party initiating the proceedings and unless otherwise ordered the cost thereof shall be taxed in the cause.

27. Unless the Referee so directs non-compliance with the Rules shall not render notice or any other act or proceeding void, but the same may be set aside either wholly or in part as irregular or amended, or otherwise dealt with as to the Referee may seem just.

28. An application to set aside any proceedings for irregularity shall be made within a reasonable time, and shall not be allowed if the party applying has taken a fresh step after knowledge of the irregularity.

29. Every county court clerk shall at the request of any party, and upon receiving a præcipe for the purpose and payment of the necessary postage or express charges for the transmission and return of the same, transmit to the Referee the proceedings on fyle in his office.

30. Unless the Referee gives leave to the contrary there shall be at least two clear days between the services of a notice of motion and the day for hearing, and in the computation

of such two clear days, Sundays and days on which the offices are closed shall not be reckoned.

31. The Referee may enlarge or abridge the time appointed by these Rules or fixed by an order for doing any act or taking any proceedings upon such terms as may seem just, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

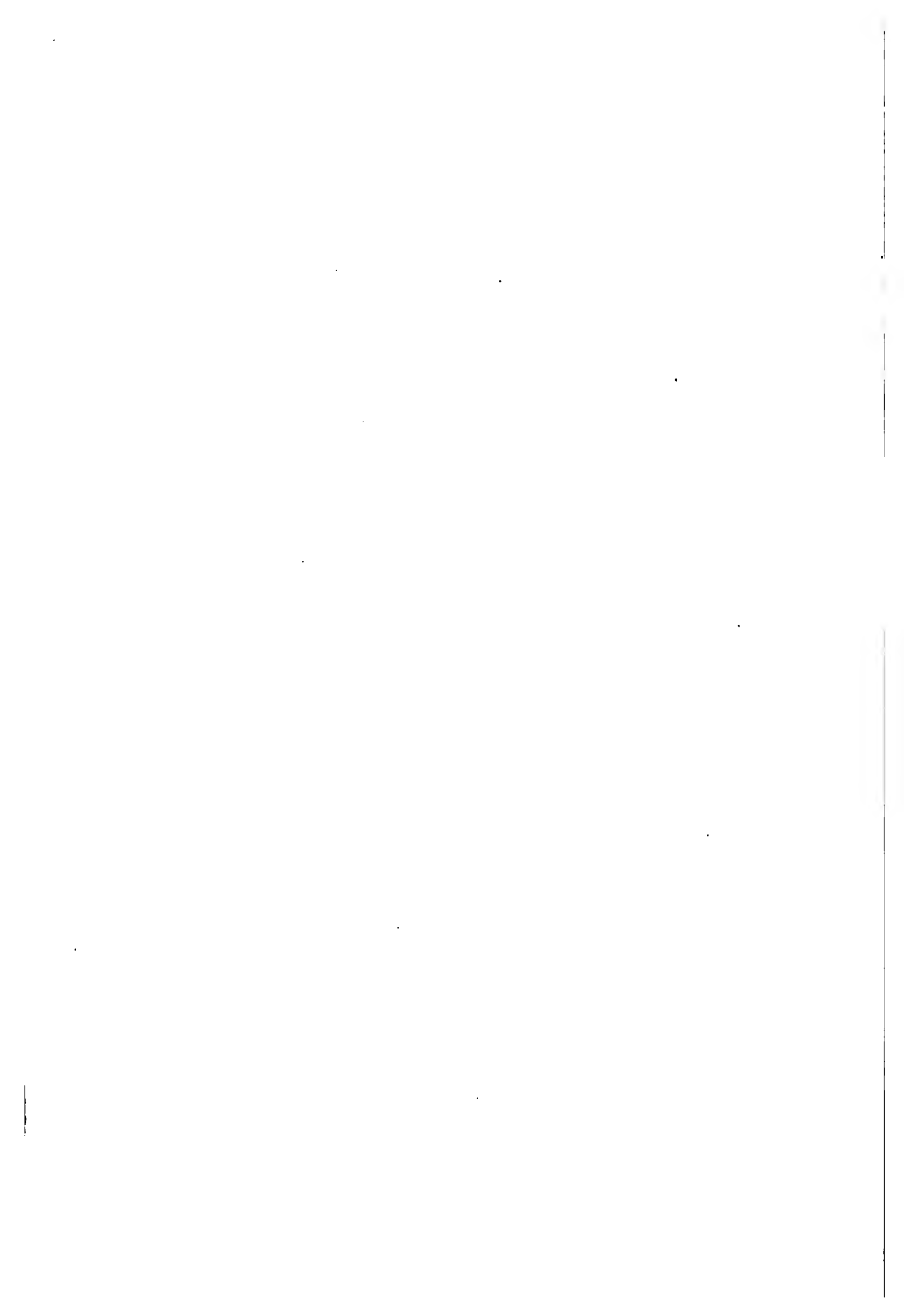
32. Unless by consent or in case of urgency, by leave of the Referee, no trial shall take place or motion be heard during the "long vacation" or the "Christmas vacation" observed by the High Court of Justice.

33. Unless otherwise directed costs shall be taxed by the clerk of the county court with whom the papers are filed.

34. Costs shall be taxed and allowed on the scale of the High Court, County Court or Division Court as the Referee shall direct in his decision or report.

35. Where costs are allowed the Referee shall fix the amount of counsel fees to be taxed.

36. The clerk of the county court shall, when required by the Referee, be clerk of the drainage court, and shall be entitled to the same fees as in a county court case, upon the production of the certificate of the Referee.













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